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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 754

STATE OF TEXAS, STATE OF LOUISIANA, RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States appellants, the STATE OF TEXAS, the STATE OF LOUISIANA, the RAILROAD COMMISSION OF TEXAS, the LOUISIANA PUBLIC SERVICE COMMISSION, LIBBEY-OWENS-FORD GLASS COMPANY, OWENS-ILLINOIS GLASS COMPANY and KNOX GLASS BOTTLE COMPANY OF MISSISSIPPI, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause:

(a) THE STATUTORY PROVISION BELIEVED TO SUSTAIN THE JURISDICTION

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judg-

ment here complained of is conferred by 28 U. S. C., Sections 1253 and 2101(b).

(b) The Statute of the State or Statute or Treaty of the United States, the Validity of Which Is Involved

This appeal does not involve the validity of a statute or treaty of the United States. It involves the validity of an order of the Interstate Commerce Commission entered on May 25, 1948, pursuant to and for the purpose of putting into effect an order of the Commission dated March 3, 1947, (268 I. C. C., 195), prescribing intrastate freight rates on dense soda ash for the States of Texas and Louisiana.

(c) The Date of the Judgment Sought To Be Reviewed and the Date Upon Which the Application for Appeal Is Presented

The judgment of the District Court sought to be reviewed was entered on the 26th day of January, 1949, the application for appeal filed on the 23 day of March, 1949, and presented to the District Court on the 23 day of March, 1949.

(d) Statement Showing that the Nature of the Case and the Rulings of the Court Were such as to Bring the Case Within the Jurisdictional Provisions Relied Upon

This is a suit by Texas and Louisiana and their respective Railroad and Public Service Commissions against the United States of America and the Interstate Commerce Commission in which complainants, invoking the jurisdiction of a statutory three-Judge District Court, sought to enjoin, set aside and annul an order of the Interstate Commerce Commission dated May 25, 1948, prescribing intrastate freight rates in Texas and Louisiana for the transportation of dense soda ash in carload lots, which order was made pursuant to and for the purpose of putting into effect an order of the Commission dated March 3, 1947, (268 I. C. C., 195). Libbey-

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Owens-Ford Glass Company, Owens-Illinois Glass Company and Knox Glass Bottle Company of Mississippi, manufacturers of glass products, with plants located at Shreveport, Louisiana, Waco, Texas, and Palestine, Texas, respectively, intervened on the side of complainants. (28 U. S. C., Sections 41(28), 43 to 48, inclusive, 49 U. S. C., Section 17(9)).

Prior to the action of the Interstate Commerce Commission which this suit seeks to enjoin State-prescribed freight rates per one hundred pounds for shipments in carload lots of dense soda ash, an ingredient used in the manufacture of glass products, were as to Texas, nineteen cents from the producing point at Corpus Christi to Waco and Palestine and as to Louisiana, seventeen cents from points of production at Lake Charles and North Baton Rouge to Shreveport.

The order of the Interstate Commerce Commission dated March 3, 1947, was entered, after hearing, on the complaint of the Corporation Commission of Oklahoma and Public Service Commission of Arkansas on behalf of manufacturers of glass products in those States. It was based upon the Commission's findings and report, concluding that the Texas and Louisiana intrastate freight rates violated 49 U. S. C., Sections 1, 3 and 13 (4), in that they gave an undue or unreasonable advantage or preference to the intrastate commerce of intervenors-appellants and were prejudicial to interstate commerce of the complaining manufacturers in Oklahoma and Arkansas. The Commission ordered that the interstate freight rates be reduced by six cents and that the intrastate freight rates in both Texas and Louisiana be increased by four cents. (268 I. C. C., 195). Petitions for rehearing and reconsideration were denied by the entire Commission by order entered September 4, 1947, and without further hearing the Interstate Commerce Commission, Division 3, entered the order of May 25, 1948. Copies of the report and order of March 3, 1947, the order of September 4, 1947 and the order of May 25, 1948, are attached as Appendices "A", "B" and "C".

Thereafter this suit was filed, heard and determined by a statutory three-Judge District court and resulted in a judgment, one Judge dissenting, dismissing complainants' suit. Copies of the opinion and judgment of the District Court are attached as Appendices "D" and "E".

The following decisions are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the judgment here in question.

North Carolina *vs.* United States, 325 U. S. 507, 89 L. Ed. 1760;

New York *vs.* United States, 331 U. S. 284, 91 L. Ed. 1492;

Ayrshire Collieries Corporation *vs.* United States, — U. S. —, 93 L. Ed. 220.

(e) Statement of the Grounds Upon Which it Is Contended that the Questions Involved Are Substantial

The basic question presented is whether the findings of the Interstate Commerce Commission were based upon substantial, sufficient and competent evidence. Specifically, the complaint is that the order of the Interstate Commerce Commission has been entered with no substantial evidence in these respects:

(1) There is no evidence as to the reasonableness of the intrastate freight rates when tested by the usual and accepted standards.

(2) There is no evidence as to the reasonableness of either the interstate freight rates against which discrimination is claimed, or the intrastate freight rates which it is claimed discriminate.

(3) The finding of the Interstate Commerce Commission is based solely upon the disparity between the intrastate and interstate freight rates.

(4) The record before the Interstate Commerce Commission failed to show a single specific instance

where an interstate shipment was either prevented or retarded and which was attributable to either intrastate freight rate.

(5) The record before the Commission was devoid of any evidence whatever of specific loss of business by any competitor attributable to either intrastate freight rate.

(6) That, if there were any discrimination whatever, it was unsubstantial and did not justify the action of the Commission.

It is contended that the questions herein presented are substantial. As to the complaints, it is believed that the Interstate Commerce Commission is exceeding its power and authority and is proceeding to invade the rights of the respective States and their Commissions upon mere conjecture and without sufficient evidence. As to the intervenors, the question is very substantial, in that the increase ordered by the Interstate Commerce Commission will increase by many thousands of dollars each year the freight which they must pay upon an important ingredient used by them in their operations.

Respectfully submitted,

PRICE DANIEL,
Attorney General of Texas;
CHARLES E. CRENSHAW,
Assistant Attorney General of Texas;
Capitol Building,
Austin Texas;
Attorneys for the State of Texas and the Railroad Commission of Texas;
BOLIVAR E. KEMP, JR.,
Attorney General of Louisiana;
CARROLL BUCK,
First Assistant Atorney General of Louisiana;
Capitol Building,
Baton Rouge, Louisiana;

[CONTINUED ON NEXT PAGE]

SIDNEY M. COOK,
Special Assistant to the Attorney General of Louisiana;
1500 Commercial Bank Building,
Shreveport, Louisiana;
Attorneys for the State of Louisiana and the Louisiana Public Service Commission;
A. W. GILLILAND,
1108 Colcord Building,
Oklahoma City, Oklahoma;
Attorney for Intervenors, Libbey-Owens-Ford Glass Company, Owens-Illinois Glass Company and Knox Glass Bottle Company of Mississippi;
WELLES, KELSEY, FULLER, COBOURN AND HARRINGTON,
Toledo, Ohio, and
J. F. LAWRENCE,
706 Ritz Bldg,
Tulsa, Okla.;
Attorneys for Owens-Illinois Glass Company;
ARNOLD BOYD,
60 Broadway,
New York, New York;
Attorney for Knox Glass Bottle Company of Mississippi;
SIDNEY M. COOK,
CHARLES D. EGAN,
1500 Commercial Bank Building,
Shreveport, Louisiana,
Attorneys for Libbey-Owens-Ford Glass Company.

APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

No. 29354

CORPORATION COMMISSION, STATE OF OKLAHOMA, ET AL.

v.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

Submitted December 19, 1946. *Decided March 3, 1947.*

1. Rates on dense soda ash, in carloads, from North Baton Rouge and Lake Charles, La., and Corpus Christi, Tex., to glass manufacturing points in Oklahoma and Arkansas, and to Wichita Falls, Tex., found unjust and unreasonable.

2. Rates on like traffic from the same origins to glass manufacturing points in Oklahoma and Arkansas and to Palestine and Waco, Tex., and Shreveport, La., found unjustly discriminatory against interstate traffic of the complaining manufacturers, unduly preferential of glass manufacturers at Palestine, Waco and Shreveport, and unduly prejudicial to glass manufacturers in Oklahoma and Arkansas.

3. Rates on like traffic to Jackson, Miss., Memphis, Tenn., and St. Louis and Kansas City, Mo., areas found not shown to be unjust or unreasonable.

4. Lawful rates and rate relations prescribed for the future.

J. A. Atkins, C. B. Bee, H. J. Conley, G. O. Nickel, B. F. Rea, and *T. W. Wood* for complainants.

Olin Culberson, Ernest O. Thompson, Beauford H. Jester, and *C. R. McNamee* for Railroad Commissioner of Texas.

H. C. Ames, V. W. Appleby, Ed. P. Byars, F. O. Holt, H. G. Huhn, F. G. Moore, O. T. Myerhoff, L. M. Shepardson, and *E. F. Underwood* for other interveners.

B. F. Batts, A. J. Baumann, James G. Blaine, Harry E. Boe, S. H. Brittingham, Jr., John P. Bullington, C. L.

Butler, William E. Davis, A. J. Maloney, G. H. Muckley, T. J. Schleef, W. R. Scruggs, R. H. Singleton, Cyril J. Smith, Robert Thompson, E. A. Trapp, Toll R. Ware, C. W. Waterman, Stanfield Johnson, Clyde W. Fiddes, and *Earle J. Zoll, Jr.,* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS MILLER, ROGERS, AND PATTERSON BY DIVISION 3:

Exceptions to the report proposed by the examiners were filed by complainants, defendants and interveners and we have heard the parties in oral argument.

Complainants, Corporation Commission of the State of Oklahoma and Arkansas Public Service Commission, on behalf of glass manufacturers at points in their States, including Fort Smith, Ark., and Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs and Sapulpa, Okla., allege by complaint filed July 2, 1945, that the rates,[1] rules, regulations, and minimum weights applied on shipments of dense soda ash, in carloads, from North Baton Rouge and Lake Charles, La., and Corpus Christi, Tex., to the complaining points and to Wichita Falls, Palestine, and Waco, Tex., Shreveport, La., Jackson, Miss., Memphis, Tenn., and the St. Louis[2] and Kansas City,[3] Mo., areas, are unjust, unreasonable, unjustly discriminatory, unduly preferential of glass manufacturers at Palestine, Waco, Shreveport, Jackson, and in the St. Louis area, and unduly prejudicial to the complaining glass manufacturers, in violation of sections 1, 3 and 13 of the Interstate Commerce Act. Complainants asks us to prescribe lawful rates and rate relations for the future. As the complaint brings in issue, under section 13, the intrastate rates on this commodity to Palestine and Waco from Corpus Christi, and to Shreveport

[1] Rates will be stated in cents per 100 pounds. Increases authorized in 1946 are not included.

[2] Including St. Louis and Crystal City, Mo., and East St. Louis, Alton, Federal, Roxana, and Wood River, Ill.

[3] Including Kansas City, Dodson, Weldon Springs, Mo., and Kansas City, Kans.

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from Lake Charles and North Baton Rouge, copy of the complaint and notice of the proceeding was served on the State authorities of Texas and Louisiana. The Waco Chamber of Commerce and glass manufacturers at Palestine, Waco, Shreveport, Jackson, Alton, Ill., and other points, intervened in opposition to any increase in the rates to their destinations. The Southern Alkali Corporation, which produces soda ash at Corpus Christi, intervened in opposition to any disturbance of the origin relations, and the Railroad Commission of Texas also intervened.

Soda ash is a basic alkali in powdered form, known chemically as sodium carbonate (NA_2CO_3), produced by roasting or calcining a mixture of salt dissolved in water, limestone, and ammonia; 1.5 to 1.75 tons of salt, 2,700 pounds of limestone, and 3 to 4 pounds of ammonia being required to produce a ton of soda ash. About 130 pounds of coke to a ton of soda ash is required for burning the limestone, the other fuel being natural gas. Where not additionally processed, the product is known as light soda ash, with a densdensity ranging from 60 to 63 pounds per cubic foot, a value f. o. b. origin of about $14 per ton, used principally in the paper, soap, alumin, oil refining, and chemical industries. When dampened into crystals and run through a densifier, the resulting product is known as dense soda ash, with a density ranging from 60 to63 pounds per cubic foot, a value f. o. b. origin of about $15 per ton, used principally in the glass industry. When mixed with caustic soda or lye, the resulting product is known as modified soda ash, used principally in the manufacture of washing compounds. Light and dense soda ash are loaded into box cars with a spout or spray, and can be and are readily loaded to 80,000 and over 100,000 pounds per car, respectively.

Soda ash is and has for many years been produced at Detroit and Wyandotte, Mich., Barberton and Painesville, Ohio, Buffalo, Niagara Falls, and Syracuse, N. Y., and Saltville, Va., in official territory. It has been produced at Corpus Christi, Lake Charles, and North Baton Rouge since September and December, 1934 and March 1935, respectively. All three plants are served by water and the Missouri Pacific System, Corpus Christi and Lake Charles

are served by the Texas and New Orleans Railroad Company, and North Baton Rouge by the Illinois Central System.

The table set forth in the appendix is illustrative of the rate situation presented. The rate-making hauls from North Baton Rouge to Jackson, Memphis, and St. Louis are through southern territory, while the other hauls are in southwestern territory. Soda ash is rated fifth class in western classification. However, on March 17, 1930, by agreement among the shippers and carriers, it was accorded exception or column ratings of column 30, minimum 45,000 pounds, and column 22½, minimum 70,000 pounds, from and to points in the Southwest, the column 22½ basis being the same column basis as applies on soda ash in official territory, minimum 45,000 pounds, and about on the same level as the column 25 basis, minimum 40,000 pounds, to points in southern territory prescribed for soda ash and other soda products in *Mathieson Alkali Works v. Louisville & N. R. Co.*, 153 I. C. C. 784. The Column numbers are percentages of first class. The column 22½ basis still applies on soda ash within official territory, and this is likewise true of the column 25 basis to destinations in the South, except for certain water-compelled rates from the three Gulf plants to points on the Gulf and Mississippi River and truck-compelled rates to Jackson. However, since the commencement of production at the three Gulf plants, followed by the establishment of glass plants at Palestine and Waco, on July 1, 1941, and January 1, 1944, respectively, the column 22½ basis within the Southwest has been entirely superseded by a much lower group and differential adjustment, including rates to points on the Gulf and Mississippi and Missouri Rivers, to meet water competition, rates to Jackson to meet truck competition, rates to the St. Louis and Kansas City areas to meet the competition of the nearest official territory origin, generally Detroit, Mich., the rates from Corpus Christi and Lake Charles to the St. Louis area being applied over routes through Arkansas and applied as maxima to intermediate points in that State east of Fort Smith, with equalization or narrow origin differentials to enable the three Gulf plants

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to compete with each other, and with relatively low rates to Palestine, Waco and Shreveport to meet potential truck competition, and to encourage glass production at those points by applying as maxima, water-compelled rates to West Monroe, La., where paper is produced. This adjustment alternates with a rating of column 20, minimum 100,000 pounds, established on dense soda ash on May 10, 1942.

From the Gulf plants, the present rates to Memphis, Jackson, and Kansas City area average about 15 percent of first class, the present rates to Palestine, Waco, Shreveport, and the St. Louis area, average about 12 or 12.5 percent of first class, while the water-compelled rates to the Texas and Louisiana Gulf ports range from 6.4 to 10.6 percent of first class. In the meantime, the only adjustment that has been made from the Gulf plants to the complaining points and Wichita Falls is the reduction to the Kansas City basis in May 1941, and further reduction of 2 cents in February and March 1944, to alternate with the column 20 basis, resulting in an average level of about 17 percent of first class. Thus, the rates on dense soda ash from the Gulf plants to the complaining points and Wichita Falls are higher than any other corresponding rates of record, except those to the Kansas City area, and are higher, both absolutely and relatively, than the corresponding rates accorded glass manufacturers at Palestine, Waco, Shreveport, Jackson, and the St. Louis area. It is true that the basis accorded complainants is about on the same level, distance considered, as the corresponding rates on light soda ash to paper manufacturing points in eastern Arkansas, and the rates on soda ash from official territory origins to the complaining destinations, but the complaining manufacturers do not compete with the paper producers and there is no movement of soda ash from the official territory origins to Oklahoma and Arkansas. The present intrastate rates within Louisiana and Texas are maintained by authority of the respective State commissions. From the Gulf plants, water competition is keenest to the Gulf ports and there is combined water and market competition to the St. Louis area.

The importance of the rates on soda ash to glass manu-

facturers is indicated by the table below, which shows the receipts in 1944 of soda ash and other inbound raw materials by the principal complaining manufacturers, and the average of relative amounts of the various inbound materials used by one of the principal interveners in producing 30,000 pounds of glass:

	Complainants[1] Pounds	Intervener Pounds
Soda ash[2]	50,041,000	6,538
Limestone	25,646,000	6,491
Silica Sand	114,260,000	19,520
Feldspar	6,885,000	2,928
Cullet	42,814,000	—
Salt Cake	2,906,000	—
Borax[3]	736,000	—
Barytes	—	291
Fluorspar	—	43
Decolorizer	—	12

[1] Four companies unless otherwise noted.

[2] Five companies.

[3] Three companies.

The following is a summary of the competitive situation as disclosed by the record, insofar as material to this proceeding. One of the complaining manufacturers at Fort Smith makes window glass and markets its product west of the Mississipppi River and in portions of Tennessee, Mississippi, Alabama, Georgia, Florida, and Illinois in competition with the manufacturers at Shreveport. It obtains its soda ash from Lake Charles and Corpus Christi, and is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1 percent of its inbound materials in weight and about 50 percent in cost (excluding cullet), as contrasted with silica sand, which constitutes 38.5 percent of its inbound materials in both weight and cost. Complaining manufacturers who produce and ship window glass, in competition with the Shreveport intervener, are located also at Henryetta and Okmulgee. The complaining manufacturer at Sand Springs makes glass jars and jelly glasses, markets its products west of the Mississippi River and east of the Rocky Mountains in competition with manufacturers at Palestine, Waco, Jackson,

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and Alton, and is severely handicapped by its relatively high rates on soda ash, which it obtains from North Baton Rouge and Corpus Christi and which constitutes about 25 percent of its inbound raw material in weight and from 50 to 60 percent in cost. Complaining manufacturers who produce and ship glass containers, in competition with the Palestine and Waco interveners, are located also at Ada, Blackwell, Okmulgee, Poteau, and Sapulpa.[4] There is no justification considering transportation and other conditions and circumstances, for a substantially different average level of rates on this traffic to the complaining points than to Palestine, Waco, and Shreveport. Interveners made no contrary contention at the hearing or on brief. However, on exceptions and oral argument, the Palestine and Waco interveners contend that "potential truck competition" precludes any increase in their present rates on soda ash. Of importance is the fact that to their points the rates are on a lower level than that of the corresponding rates to Jackson, Miss., which are affirmatively shown to have been truck compelled. Competition in the glass industry is keen. Unless the complaining manufacturers are accorded the same relative basis as their competitors at Palestine, Waco, and Shreveport they will be seriously affected.

The record is replete with comparisons of rates on the other raw materials and on the outbound glass products. These are presented principally for the purpose of showing their effect on the competitive situation. Thus the complaining manufacturers show that in their marketing territories the prices of their outbound products are generally based on the rates from the nearest manufacturer or manufacturers, namely, one or more of those at Palestine, Waco, Shreveport, Jackson or the St. Louis area, while the Palestine and Waco interveners show that the total of

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[4] Other complaining manufacturers which produce glass specialties are located at Fort Smith, Okmulgee, and Sapulpa, and may encounter competition in the future from the Palestine and Waco interveners. As this competition is merely potential, it should be understood that these complainants do not come within the purview of our findings hereinafter made under sections 3 and 13 of the Act. See *Hoffstot* v. *Monongahela Ry. Co.*, 248 I. C. C. 248, 253.

the outbound charges on 30,000 pounds of glass containers and the inbound charges on the principal raw materials used therein, based on intervener's relative amounts as shown above, is in certain instances somewhat greater via Palestine and Waco than via the complaining points, even with the latters' relatively high inbound rates on soda ash. In interveners' showing, the raw material origins used are Corpus Christi or Lake Charles for soda ash, Guion, Ark., or Roff, Okla., for silica sand, Mosher or Joplin, Mo., for limestone, Denver, Colo., for feldspar, Mineral Point, Mo., for barytes, and Salida, Colo., for fluorspar, and the destinations used for the finished product are 12 in number, viz., Memphis, Kansas City, and Rogers, Ark., 4 destinations in Oklahoma, and 5 in Texas. Of course, such a showing would vary according to the destinations used and the relative amounts and origins of the raw materials. Here the 4 Oklahoma destinations used are all in the complaining territory. In any event, the complaining manufacturers are generally accorded outbound rates on their finished products and inbound rates on their raw materials other than soda ash no more favorable than those of their competitors. To destinations to which their aggregate freight charges may be somewhat less than those of their competitors, they are unduly deprived of the benefit of their geographical location by their relatively high rates on soda ash.

Based on a loading of 100,000 pounds, the yields per car-mile from column 12, 15, and 17 rates range from about 75, 94, and 107 cents for 240 miles to 40, 50, and 57 cents for 800 miles, which the average haul in the southwestern region is about 240 miles, and the average car-mile expenses are about 17 cents. The present intrastate rate on soda ash from Corpus Christi to Palestine and Waco, of 19 cents for an average distance of about 335 miles yields about 11 mills per ton-mile, as compared with the average ton-mile yield of all Texas lines of about 10 mills for 180 miles. However, comparisons of earnings on a given commodity with average earnings or expenses on all traffic are not particularly apposite.

Numerous point-to-point rates on other commodities within the Southwest are shown of record, some higher and

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some lower than the rates assailed, distance considered. The better comparisons with rates on other commodities are the rates prescribed by the Commission for general application in the Southwest on other heavy loading commodities, including the following having representative values per ton f. o. b. origin as given in parentheses: about column 8 on silica sand ($1.50), column 11 on crude clay ($3.50-$7.19), column 12 on phosphate rock ($3.00), column 12½ and 15 on scrap iron and steel ($16.74), about column 13 on cement ($8), column 14 on ground barite or barytes ($12.65-$13.30), column 15 on oyster shells ($8-$10) and cullet ($3-$6), column 16 on bulk salt ($3.73), and column 17½ on rough stone blocks ($12.22).

Complainants and the intervening glass producers propose that the rates to the complaining plants and Wichita Falls, Memphis, Jackson, and the Kansas City area be reduced so as to be on the same average level as the rates to Palestine, Waco, Shreveport, and the St. Louis area, namely, about column 12. This would result in a 30 percent reduction in the rates to the complaining plants and Wichita Falls, or from 35-37 to 26 cents, and about a 20 percent reduction to Memphis, Jackson, and the Kansas City area, to which the rates now average about column 15.

Defendants propose that no change be made in the rates to the complaining plants and Wichita Falls, or in the rates to Memphis, Jackson, or the Kansas City and St. Louis areas, made to meet water, market, and truck competition, and that the rates to Palestine, Waco and Shreveport be increased so as to be on substantially the same average level as the present rates to the complaining plants and Wichita Falls, namely, column 17. Specifically, defendants propose that the rates from North Baton Rouge, Lake Charles, and Corpus Christi to Shreveport be increased from 17, 17, and 19 cents, to 21, 21, and 25 cents, respectively, to Palestine from 19, 17, and 19 cents respectively, to 25 cents, and to Waco from 21, 19, and 19 cents, to 30, 28, and 28 cents, respectively. Defendants filed an application with the Louisiana Commission for authority to establish the proposed intrastate rate of 21 cents to Shreveport from Lake Charles and North Baton Rouge, and with the Texas

Commission for authority to establish the proposed intrastate rates of 25 and 28 cents to Palestine and Waco from Corpus Christi. The latter was denied by the Texas Commission, whereupon defendants postponed any adjustment of the interstate and intrastate rates to the three points named pending the outcome of this proceeding.

Interveners object to the rates proposed by defendants to Palestine, Waco, and Shreveport, not only because of the level of the rates but because of the resulting disruption in the present origin and destination relations in connection with such rates. No evidence was adduced to warrant any substantial disruption in the origin relations, or in the destination relations except for such adjustment as may be necessary to narrow the spread [5] between the complaining points and Wichita Falls and Palestine, Waco, and Shreveport. The Corpus Christi intervener affirmatively shows that the present group and differential adjustment on this traffic is no more extensive than on numerous other commodities, including salt cake, feldspar, and imported sodium and potassium.

The conclusion is justified that lawfulness in the rates required that the 100 percent spread between the rates to the complaining points and Wichita Falls and rates to Palestine, Waco, and Shreveport be narrowed by reducing the former and increasing the latter substantially to a common level subject to a high minimum, or specifically the rates to the complaining points and Wichita Falls should be reduced 4, 5, and 6 cents to 31 cents, while the rates to Palestine, Waco, and Shreveport should be increased by 4 cents, thus substantially preserving the present origin relations, and the present destination relations as between Palestine, Waco and Shreveport. As is characteristic of a group and differential adjustment, rates thus prescribed will, of course, bear a progressively lower relation to first class as distance increases. Thus to the Louisiana and Texas destinations an increase of 4 cents would result in rates that range from 21 cents, or 17.8 percent of first

[5] This spread is about 100 percent of the lower rates. The parties agree that it should be narrowed but differ as to how this should be accomplished.

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class, from Lake Charles to Shreveport, 174 miles, to 25 cents or 13.1 percent of first class, from North Baton Rouge to Waco, 441 miles, while to the complaining group, reductions of 4, 5, and 6 cents would result in a rate ranging from 17.5 percent of first class from Lake Charles to Poteau, 408 miles, to 12.5 percent of first class from Corpus Christi to Blackwell, 717 miles. Under this adjustment the rate from Corpus Christi to the St. Louis area, 31 cents, will not be exceeded. The rates to Memphis, Jackson, and the Kansas City area, although made to meet water, truck, and market competition, are substantially in line with rates prescribed by the Commission on other heavy loading commodities, for general application in the Southwest. The rates to the St. Louis area are relatively lower than such prescribed rates, but are made to meet compelling water and market competition.

Complainants' rates are generally subject to a minimum of 100,000 pounds, while those of their competitors are generally subject to a minimum of 80,000 pounds. Defendants and the intervening glass producers do not oppose an increase in the carload minimum to Palestine, Waco, and Shreveport to 100,000 pounds, and the Texas Commission expresses willingness to approve such increase in connection with the intrastate rates from Corpus Christi to Palestine and Waco, upon the filing of an appropriate application. For such a high minimum rates are justified that are relatively lower than rates that would be recognized as reasonable maxima for a minimum of 40,000 pounds which was prescribed in connection with rates on soda ash to destinations in southern territory.

As stated by the intervening manufacturers, in order to establish unlawful person-locality preference and prejudice within the meaning of sections 3 or 13 of the act, it must not only be shown that there is an unjustified disparity in rates from a transportation standpoint, but that there is substantial competition between the complaining parties and those alleged to be preferred so that the rate disparity may be said to result in disadvantage to the former and corresponding advantage to the latter. Complainant must show that shipments have been or will be made or prevented or that complainant has been or will be otherwise injured be-

cause of the rate of disparity. We are here dealing with rates on an inbound raw material. In the nature of things the exact effect on the marketing of the finished product can not be shown. The language of sections 3 and 13 is broad and contains sweeping prohibitions against every form of undue prejudice, preference, advantage, or disadvantage, or unjust discrimination, as between persons and localities. There is real substantial, and unwarranted disparity in the inbound rates on soda ash, an important raw material in the manufacture of glass, and there is keen competition in the sale of the finished products between the complaining manufacturers who are subjected to the relatively high rates and those at Palestine, Waco, and Shreveport who are accorded the relatively low rates. Such rate disparity results and will result pro tanto in depriving the complaining manufacturers of that fair opportunity to which the law entitles them.

Soda ash is generally sold on the basis of the freight rate from the nearest of lowest-rated point of origin. Complainants therefore contend that rates on this traffic should be based on the distance from such origin. These distances have been considered. We see no reason, however, for any substantial disruption of the origin relation and grouping and the average distance from the three origins therefore must also be considered.

We Find:

1. That the rates assailed to the complaining points and Wichita Falls are, and for the future will be, unjust and unreasonable to the extent that they exceed, or may exceed, 31 cents plus the increase of 20 percent authorized December 5, 1946.

2. That the rates assailed to the complaining points and Palestine, Waco, and Shreveport are, and for the future, will be, unduly prejudicial and preferential and unjustly discriminatory against the interstate traffic of the complaining manufacturers in favor of glass manufacturers at such other points to the extent that they bear a relation less favorable to the former and more favorable to the latter than is reflected by the prescribed rate of 31 cents to the complaining points plus the increase of 20 percent author-

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ized December 5, 1946, and rates 4 cents higher than the present rates to Palestine, Waco, and Shreveport, plus a like increase of 20 percent, and that such preference, prejudice and discrimination as between interstate and intrastate commerce is caused in part by the maintenance of relatively low intrastate rates from North Baton Rouge, and Lake Charles to Shreveport, and from Corpus Christi to Palestine, and Waco to the extent that such intrastate rates are below those prescribed herein.

3. That such undue prejudice and preference and unjust discrimination can and should be removed by the establishment and maintenance of the prescribed rate to the complaining points and rates 4 cents higher than the present rates to Palestine, Waco, and Shreveport, plus the 20-percent increase, which rates we find to be just and reasonable.

4. That the rates herein prescribed shall be subject to a uniform minimum not exceeding 100,000 pounds.

5. That the rates assailed to Memphis, Jackson, and the Kansas City and St. Louis areas are not shown to be unjust or unreasonable. There is no warrant upon the facts of record for prescription of fixed relations between rates to these points and rates to the complaining points.

An appropriate order will be entered requiring establishment of the rates on interstate traffic herein prescribed. Following our practice in such cases, we shall for the present leave it to defendants and the Louisiana and Texas Commissions to make modifications in accordance with our findings as to intrastate traffic in those States. If this is not accomplished by the time the interstate schedules are required to be filed, the matter may be brought to our attention.

Docket No. 29354

APPENDIX

RATES ON DENSE SODA ASH, IN CARLOADS

From / To	North Baton Rouge, La.			Lake Charles, La.			Corpus Christi, Tex.		
		Rates			Rates			Rates	
	Distance Miles	Present Cents	Prescribed[1] Cents	Distance Miles	Present Cents	Prescribed[1] Cents	Distance Miles	Present Cents	Prescribed[1] Cents
Fort Smith, Ark.	489	37	31	437	36	31	671	37	31
Ada, Okla.	516	37	31	461	37	31	564	37	31
Blackwell, Okla.	701	37	31	646	37	31	717	37	31
Henryetta, Okla.	575	37	31	521	37	31	623	37	31
Okmulgee, Okla.	583	37	31	532	37	31	636	37	31
Poteau, Okla.	459	37	31	408	35	31	642	37	31
Sand Springs, Okla.	603	37	31	552	37	31	683	37	31
Sapulpa, Okla.	608	37	31	557	37	31	668	37	31
Wichita Falls, Tex.	550	37	31	493	37	31	515	37	..
Shreveport, La.	225	17	[2]21	174	17	[2]21	454	19	23
Palestine, Tex.	363	19	23	244	17	21	358	19	[2]23
Waco, Tex.	441	21	25	316	19	23	313	19	[2]23
Jackson, Miss.	167	20	..	299	22	..	654	25	..
Memphis, Tenn.	368	29	..	431	29	..	776	31	..
St. Louis, Mo.	657	29	..	692	29	..	999	31	..
Kansas City, Mo.	787	39	..	734	39	..	890	39	..

[1] Subject to an increase of 20 percent as authorized December 5, 1946, on interstate shipments of soda ash.

[2] Intrastate.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, DIVISION 3, held at its office in Washington, D. C., on the 3rd day of March, A. D. 1947

No. 29354

CORPORATION COMMISSION, State of Oklahoma, and Arkansas Public Service Commission

v.

ABILENE & SOUTHERN RAILWAY COMPANY; ALTON & SOUTHERN RAILROAD; The Alton Railroad Company (Henry A. Gardner, Trustee); Arkansas & Louisiana Missouri Railway Company; The Arkansas Western Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Burlington-Rock Island Railroad Company; Chicago and Eastern Illinois Railroad Company; Chi-

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cago & Illinois Midland Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago, Rock Island and Pacific Railway Company, (Joseph B. Fleming and Aaron Colnon, Trustees); Columbus and Greenville Railway Company; The Denison and Pacific Suburban Railway Company; El Dorado and Wesson Railway Company; Fort Smith, Subiaco & Rock Island Railroad Company; Fort Worth and Denver City Railway Company; Galveston, Houston and Henderson Railroad Company; Gulf and Ship Island Railroad Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Illinois Terminal Railroad Company; The Joplin-Pittsburgh Railroad Company; Kansas City Public Service Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; Litchfield and Madison Railway Company; Louisiana & Arkansas Railway Company; The Louisiana and North West Railroad Company; Louisville and Nashville Railroad Company; Midland Valley Railroad Company; Mississippi Central Railroad Company; Missouri and Arkansas Railway Company; Missouri-Illinois Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Lines; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); The Beaumont, Sour Lake & Western Railway Company (Guy A. Thompson, Trustee); Houston and Brazos Valley Railway Company (Guy A. Thompson, Trustee); International-Great Northern Railroad Company (Guy A. Thompson, Trustee); New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee); New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee); The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee); Rio Grande City Railway Company (Guy A. Thompson, Trustee); The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee); San Antonio Southern Railway Company (Guy A. Thompson, Trustee); San Antonio, Uvalde & Gulf Railroad Company (Guy A.

Thompson, Trustee); Sugar Land Railway Company (Guy A. Thompson, Trustee); The Nacogdoches & Southeastern Railroad Company; The Nashville, Chattanooga & St. Louis Railway; Natchez & Southern Railway Company (Guy A. Thompson, Trustee); The Natchez, Urania and Ruston Railway Company; New Orleans and Northeastern Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; North Louisiana & Gulf Railroad Company; Oklahoma City-Ada-Atoka Railway Company; Okmulgee Northern Railway Company; Panhandle and Santa Fe Railway Company; The Pennsylvania Railroad Company; Roscoe, Snyder and Pacific Railway Company; The St. Louis and O'Fallon Railway Company; St. Louis & Troy Railroad Company; St. Louis and Ohio River Railroad; St. Louis, San Francisco and Texas Railway Company; St. Louis-San Francisco Railway Company (Frank A. Thompson, Trustee); St. Louis Southwestern Railway Company (Berryman Henwood, Trustee); St. Louis Southwestern Railway Company of Texas (Berryman Henwood, Trustee); San Springs Railway Company; Texas and New Orleans Railroad Company; Southern Railway Company; The Texas and Pacific Railway Company; Texas Electric Railway Company; The Texas Mexican Railway Company; Texas Short Line Railway Company; Tremont & Gulf Railway Company; Tulsa-Sapulpa Union Railway Company; Union Railway Company; Wabash Railroad Company; Waco, Beaumont, Trinity & Sabine Railway Company (Hoxie H. Thompson, Receiver); The Weatherford, Mineral Wells and Northwestern Railway Company; Wichita Falls & Southern Railroad Company; The Wichita Valley Railway Company; and The Yazoo and Mississippi Valley Railroad Company.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 12, 1947, and thereafter to abstain, from publishing, demanding, or collecting for the interstate transportation of dense soda ash, in carloads, from and to the points named in the next succeeding paragraph hereof, a rate and minimum which exceed those prescribed in said paragraph.

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 12, 1947, upon notice to the Commission and the general public by not less than 30 days' filing in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the interstate transportation of dense soda ash, in carloads, subject to a minimum not exceeding 100,000 pounds, from Corpus Christi, Tex., and North Baton Rouge and Lake Charles, La., to Fort Smith, Ark., Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs, and Sapulpa, Okla., and points grouped therewith and from North Baton Rouge and Lake Charles, La., to Wichita Falls, Texas, a rate which shall not exceed 31 cents per 100 pounds plus the increase of 20 pereent authorized in *Increased Railway Rates, Fares, and Charges,* 1946, 266 I. C. C., 537.

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby notified to cease and desist, on or before June 12, 1947, and thereafter to abstain from publishing, demanding or collecting for the interstate transportation of dense soda ash, from and to the points named in the next succeeding paragraph hereof, rates less than those prescribed in said paragraph.

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 12,

1947, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the interstate transportation of dense soda ash, in carloads, subject to the minimum maintained in connection with interstate rates prescribed in the third preceding paragraph hereof, from North Baton Rouge and Lake Charles, La., to Palestine and Waco, Tex., and from Corpus Christi, Tex., to Shreveport, La., rates which shall not be less than those designated as prescribed rates in the appendix to said report plus the increase of 20 percent authorized in *Increased Railway Rates, Fares, and Charges,* 1946, 266 I. C. C. 537.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

W. P. BARTEL,
Secretary.

(SEAL)

APPENDIX "B"

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of September, A. D. 1947

No. 29354

CORPORATION COMMISSION, STATE OF OKLAHOMA, et al.,

v.

MISSOURI PACIFIC RAILROAD COMPANY, et al.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of defendants' petition for reconsideration; petition of Knox Glass Bottle Co. of Mississippi and Owens-Illinois Glass Co., interveners, for reargument and reconsideration; petition of Libbey-

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Owens-Ford Glass Co., intervener, for rehearing; petition of Railroad Commission of Texas for reconsideration; and petition of Louisiana Public Service Commission for rescission, annulment, and cancellation of order; and for good cause appearing:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

W. P. Bartel,
Secretary.

[SEAL.]

APPENDIX "C"

ORDER

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 25th day of May, A. D. 1948

No. 29354

CORPORATION COMMISSION, STATE OF OKLAHOMA and ARKANSAS PUBLIC SERVICE COMMISSION

v.

ABILENE & SOUTHERN RAILWAY COMPANY; ALTON & SOUTHERN RAILROAD; The Alton Railroad Company (Henry A. Gardner, Trustee); Arkansas & Louisiana Missouri Railway Company; The Arkansas Western Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Burlington Rock-Island Railroad Company; Chicago and Eastern Illinois Railroad Company; Chicago & Illinois Midland Railway Company; Chicago, Burlington & Quincy Railroad Company; The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees); Columbus and Greenville Railway Company; The Denison and Pacific Suburban Railway Company; El Dorado and Wesson Railway Company; Fort Smith, Subiaco & Rock Island Railroad Company; Fort Worth and Denver City Railway Company; Gal-

veston, Houston and Henderson Railroad Company; Gulf and Ship Island Railroad Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Illinois Terminal Railroad Company; The Joplin-Pittsburgh Railroad Company; Kansas City Public Service Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; Litchfield and Madison Railway Company; Louisiana & Arkansas Railway Company; The Louisiana and North West Railroad Company; Louisville and Nashville Railroad Company; Midland Valley Railroad Company; Mississippi Central Railroad Company; Missouri and Arkansas Railway Company; Missouri-Illinois Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Lines; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); The Beaumont, Sour Lake and Western Railway Company (Guy A. Thompson, Trustee); Houston and Brazos Valley Railway Company (Guy A. Thompson, Trustee); International-Great Northern Railroad Company (Guy A. Thompson, Trustee); New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee); New Orleans, Texas & Mexico Company (Guy A. Thompson, Trustee); The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee); Rio Grande City Railway Company (Guy A. Thompson, Trustee); The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee); San Antonio Southern Railway Company (Guy A. Thompson, Trustee); San Antonio, Uvalde & Gulf Railroad Company (Guy A. Thompson, Trustee); Sugar Land Railway Company (Guy A. Thompson, Trustee); The Nacogdoches & Southeastern Railroad Company; The Nashville, Chattanooga & St. Louis Railway; Natchez & Southern Railway Company (Guy A. Thompson, Trustee); The Natchez, Urania and Ruston Railway Company; New Orleans and Northeastern Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; North Louisiana & Gulf Railroad Company; Oklahoma City-Ada-Atoka Railway Company;

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Okmulgee Northern Railway Company; Panhandle and Santa Fe Railway Company; The Pennsylvania Railway Company; Roscoe, Snyder and Pacific Railway Company; The St. Louis and O'Fallon Railway Company; St. Louis & Troy Railroad Company; St. Louis and Ohio River Railroad; St. Louis, San Francisco and Texas Railway Company; St. Louis-San Francisco Railway Company (Frank A. Thompson, Trustee); St. Louis Southwestern Railway Company (Berryman Henwood, Trustee); St. Louis Southwestern Railway Company of Texas (Berryman Henwood, Trustee); Sand Springs Railway Company; Texas and New Orleans Railroad Company; Southern Railway Company; The Texas and Pacific Railway Company; Texas Electric Railway Company; The Texas Mexican Railway Company; Texas Short Line Railway Company; Tremont & Gulf Railway Company; Tulsa-Sapulpa Union Railway Company; Union Railway Company; Wabash Railroad Company; Waco, Beaumont Trinity & Sabine Railway Company (Hoxie H. Thompson, Receiver); The Weatherford, Mineral Wells and Northwestern Railway Company; Wichita Falls & Southern Railroad Company; The Wichita Valley Railway Company; and The Yazoo and Mississippi Valley Railroad Company.

It appearing, That by report and order in this proceeding dated March 3, 1947, which are hereby referred to and made parts hereof, said division prescribed, under sections 1, 3, and 13, of the Interstate Commerce Act, on dense soda ash, in carloads, from North Baton Rouge and Lake Charles, La., and Corpus Christi, Texas, an interstate basic rate of 31 cents to the plants of the complaining glass manufacturers at Fort Smith, Ark., and Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs, and Sapulpa, Okla., and basic rates 4 cents higher than the then-existing basic rates to the plants of the intervening glass manufacturers at Palestine and Waco, Tex., and Shreveport, La., the rates from North Baton Rouge and Lake Charles to Palestine and Waco and from Corpus Christi to Shreveport being interstate, and from North Baton Rouge and Lake Charles to Shreveport and from Corpus Christi to Palestine and Waco being

intrastate, and found the then existing basic rates to be unduly prejudicial and preferential and unjustly discriminatory against the interstate traffic of the complaining glass manufacturers in favor of the intervening glass manufacturers to the extent that they bear a relation less favorable to the former and more favorable to the latter than would be reflected by such prescribed rates;

It further appearing, That petitions for modification of said prescription and findings were filed by defendants, intervening glass manufacturers, the Railroad Commission of Texas, and the Louisiana Public Service Commission, and that said petitions were denied by the entire Commission by order dated September 4, 1947;

It further appearing, That by said report and order of March 3, 1947, as subsequently modified, said division required the establishment and maintenance of such prescribed rates on interstate traffic but that, following the practice of the Commission in such cases, left it to defendants and the Louisiana and Texas Commissions to make modifications in accordance with its findings as to intrastate traffic, and provided that if this was not accomplished by the time the interstate schedules are required to be filed, the matter might be brought to its attention;

And it further appearing, That the basic rates so prescribed, as modified by the general increases in 1946 and 1948, have been made effective on interstate traffic, and that said general increases have likewise been made effectively in the intrastate rates in Louisiana and Texas by authority of the respective State Commissions, but that said Commissions have failed or refused to authorize the 4-cent increase in the basic rates on such traffic as prescribed by said division, and that defendants have brought this matter to our attention;

It is ordered, That defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before July 19, 1948, upon notice to the Commission and the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain from practicing the unjust discrimination, undue prejudice and preference found to

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exist in said report in the relation between the interstate rates on the above-described traffic to the plants of the complaining glass manufacturers, on the one hand, and the intrastate rates on like traffic to the plants of the intervening glass manufacturers, on the other;

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist on or before July 19, 1948, upon notice to the Commission and the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain from publishing, demanding, or collecting for the intrastate transportation of dense soda ash, in carloads, from and to the points named in the next succeeding paragraph hereof, rates less than those prescibed in said paragraph;

It is further ordered, That defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish on or before July 19, 1948, upon notice to the Commission and the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the intrastate transportation of dense soda ash, in carloads, subject to the minimum maintained in connection with the interstate rates prescribed in said order of March 3, 1947, Exhibit "D", from North Baton Rouge and Lake Charles, La., to Shreveport, La., and from Corpus Christi, Tex., to Palestine and Waco, Tex., rates which shall not be less than those designated as prescribed rates in the appendix to said report, plus the general increases authorized in *Increased Railway Rates, Fares, and Charges, 1946,* 266 I. C. C. 537, *Increased Freight Rates, 1947,* 269 I. C. C. 33, and in the mimeographed report decided April 13, 1948, in the latter proceeding.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

W. P. Bartel,
Secretary.

[SEAL.]

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4004 (Civil)

THE STATE OF TEXAS, ET AL., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Respondents*

MEMORANDUM AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit under the Urgent Deficiencies Act (38 Stat. 208, 28 U. S. C. A. 43-48) to annul and set aside an order of the Interstate Commerce Commission, prescribing intrastate freight rates on dense soda ash, from points of production at Corpus Christi, Texas, to Waco and Palestine, Texas, where it is used as a raw product in the manufacture of glass products; and from points of production at Lake Charles and Baton Rouge, Louisiana, to Shreveport, Louisiana, where it is also used in the manufacture of glass products.

The order, dated May 25, 1948, was made, after hearing, on complaint of the Corporation Commission of Oklahoma, and the Public Service Commission of Arkansas, on behalf of glass manufacturers in those States, who alleged that the State-prescribed intrastate freight rates on the soda ash from the points of production to points of manufacture within the States of Texas and Louisiana, were preferential of the local glass manufacturers, and prejudicial to competing manufacturers in the States of Arkansas and Oklahoma. The shipments from Corpus Christi to Palestine and Waco, Texas, carried a state-prescribed rate of 19 cents per cwt. in carload lots, minimum weight 100,000 pounds per car. Shipments from Lake Charles and Baton Rouge to Shreveport, carried a state-prescribed rate of 17 cents per cwt. in minimum carload lots of 100,000 pounds. The interstate

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rates from the same producing points in Texas and Louisiana to the manufacturing points in Arkansas and Oklahoma, carried a group rate of 31 cents per cwt.

The Commission's order is based upon its findings and report, entered March 3, 1947, which pertinently recites that:

"2. That the rates assailed to the complaining points [Fort Smith, Arkansas, and Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs and Sapulpa, Oklahoma] and Palestine, Waco, and Shreveport, Louisiana, are, and for the future will be, unduly prejudicial and preferential and unjustly discriminatory against the interstate traffic of the complaining manufacturers in favor of glass manufacturers at such other points to the extent that they bear a relation less favorable to the former and more favorable to the latter than is reflected by the prescribed rate of 31 cents to the complaining points plus the increase authorized December 20, 1946, and rates 4 cents higher than the present rates to Palestine, Waco, and Shreveport, plus a like increase of 20 per cent, and that such preference, prejudice and discrimination as between interstate and intrastate commerce is caused in part by the maintenance of relatively low intrastate rates from North Baton Rouge and Lake Charles to Shreveport and from Corpus Christi to Palestine and Waco the extent that such intrastate rates are below those prescribed herein."

The effect of this finding and subsequent order of May 25, 1948, was to require the respondent rail carriers to increase their freight charges on dense soda ash from 17 cents to 21 cents on intrastate movements from North Baton Rouge and Lake Charles to Shreveport, and from 19 cents to 23 cents on intrastate movements of dense soda ash from Corpus Christi to Palestine and Waco. The Commission also found that the interstate rates to manufacturing points in Oklahoma and Arkansas were unreasonably high, and ordered them to be reduced, but no attack is made on that part of the order. Following the entry of said report and order of March 3, 1947, petitions for rehearing and reconsideration were filed with the Commission and denied by the entire Commission by order of September 4, 1947.

The Railroad Commission of Texas, and the Public Service Commission of Louisiana, denied the carriers' application to increase the intrastate rates in conformity with the order of the Interstate Commerce Commission, and brought this suit, contending that there is no substantial evidence tending to show that the intrastate rates assailed are unreasonably low per se; that on the contrary, it is shown that these rates are fair and compensatory in comparison with rates of other comparable commodities for the same or similar distances. And second, it is contended that rate disparity alone does not justify a finding of undue or unreasonable preference or prejudice, but such disparity must result in injurious competition to the complaining glass manufacturers in Oklahoma and Arkansas, and that there is no such evidence in this case.

If, after a full hearing, the Interstate Commerce Commission finds any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, it is empowered under Section 13(4) of the Interstate Commerce Act, to prescribe an intrastate rate which in its judgment, will remove such advantage, preference, prejudice, or discrimination, despite any decision or order of any state authority to the contrary. Houston & Texas Ry. v. United States, 234 U. S. 342; Minnesota Rate cases, 230 U. S. 352; Florida v. United States, 282 U. S. 194.

The Commission is also empowered by the same Section of the Act to prescribe intrastate rates on a statewide level, if necessary to prevent any undue, unreasonable or unjust discrimination against interstate commerce as a whole. Thus, if the Commission finds that the intrastate rates charged and collected do not contribute their fair share to the maintenance of an adequate railway system, it is empowered to prescribe such intrastate rates as in its judgment will pay a fair proportionate share of the cost of maintenance of the transportation system. i. e. see Wisconsin R. R. Commission v. C. B. & Q. R. R. Co., 257 U. S. 563; State of New York v. United States, 257 U. S.

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591; Florida v. United States, supra; North Carolina v. United States, 325 U. S. 507.

But we are not concerned with discrimination against interstate commerce as a whole, because of the insufficiency of the intrastate rates to bear their just and equitable share of the cost of maintaining an adequate transportation system, as in the cases last cited. We therefore have no occasion to consider whether the intrastate rates in this case are fairly compensatory to the charging carriers. We have the question whether the intrastate rates charged and collected over specific routes of a railway system operate to give an undue or unreasonable preference or advantage to persons engaged in intrastate commerce over persons engaged in interstate commerce. In other words, we are dealing with rates in their relationship to each other, not in their relationship to adequate income. See Florida v. United States, supra, p. 214.

If the rates are unduly or unreasonably preferential to intrastate manufacturers, and prejudicial to the interstate manufacturers, the Commission may eliminate the forbidden preference and prejudice, even though the intrastate rates are compensatory. See Ayrshire Collieries Corp. v. United States, —— U. S. ——, decided January 3, 1949; New York v. United States, 331 U. S. 284, 344. But regardless of the underlying basis for the exertion of the Commission's power to prescribe intrastate rates, it must clearly appear from the evidence that the exercise of the dominant power is essential to the protection and advancement of interstate commerce, and that the power exercised is no more than sufficient to correct the prohibited detriment. North Carolina v. United States, supra; Florida v. United States, supra.

The Commission's order in this case explicitly recognizes that disparity alone between particular rates on intrastate and interstate traffic does not empower it to prescribe intrastate rates. Indeed, it recognizes that injurious competition between persons and localities engaged in intrastate and interstate commerce is a sine qua non to a finding of undue or unreasonable advantage, prejudice or preference, adversely affecting interstate commerce. It found

"real, substantial and unwarranted disparity in the inbound rates on soda ash, an important material in the manufacture of glass", and that there was "keen competition in the sale of finished products between the complaining manufacturers, who are subjected to the relatively high rates, and those at Palestine, Waco and Shreveport, who are accorded the relatively low rates." It was of the opinion that "such rate disparity results and will result pro tanto in depriving the complaining manufacturers of that fair opportunity to which the law entitled them." See 266 I. C. C., p. 203. It did not stop with generalizations. It particularized the competitive situation between those manufacturers of glass products who pay intrastate rates, and those paying interstate rates, and it was at pains to show specifically the effect of the cost of this important raw material upon the competitive advantages in the open market for the same glass products.

To paraphrase Mr. Justice Douglas, in Ayrshire Collieries Corp. v. United States, supra, it is not within the competence of our limited function in this field to undertake to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. The problems presented are essentially for the administrative rate-maker as long as no statutory requirement is overlooked.

We find that the Commission's findings are supported by the evidence, and they are adopted as the findings of this court.

We conclude that this court has jurisdiction of the parties and of the subject matter, and that the Commission acted within its statutory authority. Its findings are supported by the evidence and its judgment is affirmed.

ALFRED P. MURRAH,
Judge, U. S. Court of Appeals.
STEPHEN S. CHANDLER, JR.,
U. S. District Judge.

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VAUGHT, District Judge, dissenting:

I regret my inability to agree with my associates on the majority opinion.

The evidence upon which the Commission's findings are based, in my judgment, is incompetent, consisting of conclusions, and does not approach that "high standard of certainty," prescribed by the Supreme Court in North Carolina et al. v. United States et al., 325 U. S. 507; Houston & Texas Railway Company v. United States, 234 U. S. 342; Florida et al., v. United States et al., 282 U. S. 194.

The enforcement of the order should be enjoined.

EDGAR S. VAUGHT,
U. S. District Judge.

Endorsed: Filed January 26, 1949. Theodore M. Filson, Clerk.

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 4004 (Civil)

THE STATE OF TEXAS, et al., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Respondents*

JOURNAL ENTRY

Be it remembered that this cause came on for consideration on the 16 day of July, 1948. Petitioners and respondents appeared by their attorneys of record, evidence was introduced, arguments heard, and the case was admitted upon briefs, which were subsequently filed.

Now on this the 26 day of January, 1949, it is ordered, judged and decreed that the case be and is hereby dismissed at the cost of the petitioners, and that judgment be entered for the respondents and each of them.

ALFRED P. MURRAH,
Judge, U. S. Court of Appeals.
STEPHEN S. CHANDLER, JR.,
U. S. District Judge.

Endorsed: Filed January 26, 1949. Theodore M. Filson, Clerk.

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No. 754

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE STATE OF TEXAS, ET AL.,
Appellants

versus

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal From the District Court of the United States
For the Western District of Oklahoma

BRIEF OF STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION AND LIBBEY-OWENS-FORD GLASS COMPANY, APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

INTRODUCTION

This case is now before the Court on a motion to affirm filed by appelles, United States of America and Interstate Commerce Commission, pursuant to Rule 12, Paragraph 3 of the Revised Rules of this Court. Appellants, State of Louisiana, Louisiana Public Service Com-

mission and Libbey-Owens-Ford Glass Company, file this brief in opposition to the motion, pursuant to Rule 7, Paragraph 3.

OPINION OF THE COURT BELOW

The majority and dissenting opinions of the Court below are attached to appellants' jurisdictional statement as Appendix "D". They were not reported.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under the provisions of *28 U. S. C., Sections 1253 and 2101 (b)*. This is a direct appeal from the final judgment of a specially constituted District Court of three Judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a suit by appellants, State of Louisiana, Louisiana Public Service Commission and others seeking to set aside an order of the Interstate Commerce Commission.

STATUTES INVOLVED

Relevant portions of statutes involved:

28 U. S. C., 1253

28 U. S. C., 2101 (b)

49 U. S. C., 13(4)

49 U. S. C., 17(9)

are set forth as Appendices "A", "B", "C", and "D", respectively, to this brief.

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STATEMENT

A specially constituted three-Judge District Court, established pursuant to the Urgent Deficiencies Act of October 22, 1913,/[1] one Judge dissenting, dismissed a suit by the States of Texas and Louisiana and their respective Railroad and Public Service Commissions seeking to set aside an order of the Interstate Commerce Commission prescribing intrastate rates in both States to supplant previously established state prescribed rates for the transportation by rail of dense soda ash,/[2] a commodity used in the manufacture of glass./[3] Complainants and three manufacturers of glass products, who intervened on their side,/[4] perfected a direct appeal to this Court. Appellees, contending that the appeal involves no substantial question and that appellants did not exhaust their administrative recourse as required by *49 U. S. C., 17(9)*, moved, pursuant to Rule 12, Paragraph 3, of the Revised Rules of this Court, to affirm the judgment of the District Court.

1/ **28 U. S. C., 41 (28), 43 to 48, inclusive,** now superseded by **28 U. S. C., 1253, 1336, 2101, 2284, 2321 to 2325, inclusive.**

2/ Hereinafter referred to as soda ash.

3/ The order of May 25, 1948, (Appendix "C" to appellants' jurisdictional statement), was made pursuant to, and put into effect, conclusions reached in the Commission's report and order of March 3, 1947, entered, after hearing, on the complaint of the Corporation Commission of Oklahoma and the Public Service Commission of Arkansas on behalf of manufacturers of glass products in those States, (Appendix "A" to appellants' jurisdictional statement), a petition for the reconsideration of which was denied September 4, 1947, (Appendix "B" to appellants' jurisdictional statement). Copies of the majority and dissenting opinions of the District Court are attached to appellants' jurisdictional statement as Appendix "D".

4/ Libbey-Owens-Ford Glass Company, Owens-Illinois Glass Company and Knox Glass Bottle Company of Mississippi with plants located at Shreveport, Louisiana, Waco, Texas, and Palestine, Texas, respectively.

SUMMARY OF ARGUMENT

Appellants' right to a review of the decision below by this Court is conferred by statute. The question presented by this appeal, whether or not the record contains sufficient evidence to support the Commission's order, is one of the most substantial questions that can be raised when the Commission acts pursuant to the authority conferred upon it by *49 U. S. C., 13(4)*, and has been the subject of consideration and adjudication by this Court in numerous cases.

Prior to instituting this suit complainants-appellants exhausted their administrative recourse as required by *49 U. S. C., 17(9)*. Any argument to the contrary admits that the Commission entered the order under consideration without an investigation and "the full hearing" required by *49 U. S. C., 13(4)*.

ARGUMENT

THE CONTENTION THAT THE APPEAL INVOLVES NO SUBSTANTIAL QUESTION

Appellees contend that the appeal involves no substantial question for the reason that it raises no issue other than the sufficiency of the evidence in the record to support the Commission's order. At the outset we submit that any appeal which raises such an issue necessarily involves a substantial question. The question of whether or not the record upon which the Commission acted contained sufficient evidence to justify its action has been

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considered by this Court in many cases of which *Florida vs. United States, 282 U. S. 194, 75 L. Ed. 291,* and *North Carolina vs. United States, 325 U. S. 507, 89 L. Ed. 1760,* are typical.

The contention that the issue raised should not be determined by this Court, and particularly the statement in appellees' motion that "A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appellate review not called for in the interest of orderly and efficient administration of justice," cannot be reconciled with the unqualified right of appeal conferred by Congress in *Section 1253 of Title 28, United States Code.*

In view of the conclusions reached by this Court in *North Carolina vs. United States, supra,* and cases cited therein, it is clear that the Commission is without authority to supplant a state-prescribed intrastate rate in the absence of sufficient evidence./[5] On the record which this case presents appellees contend, and appellants deny, that the Commission was authorized to enter the order under consideration. Obviously, this controversy can only be resolved by a decision of this Court after hearing on the merits. The substantial nature of the questions presented by the appeal is emphasized by the fact that one member of the Court below was of the opinion that the record did not contain sufficient evidence to support the

5/ Footnote 7 of appellees' motion, in effect, concedes this point.

Commission's order. A judgment sustaining appellees' motion would deprive appellants of their statutory right of appeal.

Appellees concede that the Commission was required to consider the reasonableness of the existing intrastate rates in their relation to the rates to complaining points in Arkansas and Oklahoma, but do not point out where in its report this consideration is shown. Such consideration necessarily involves a determination that either the interstate rate or intrastate rate is reasonable when tested by accepted standards. However, the reasonableness of neither rate is shown. The sole evidence on which the Commission acted in increasing the intrastate rates was the existence of a disparity between those rates and the interstate rates. In so acting, not only did the Commission exceed its authority as defined by this Court in *Florida vs. United States and North Carolina vs. United States, supra*, it also ignored its own statement of the limitation of its authority in this respect contained in its report and quoted in appellees' motion./[6]

The record contains no evidence that the intrastate rates assailed are unreasonable, from which it follows that

6/ The Commission's report states "As stated by the intervening manufacturers, in order to establish unlawful person-locality preference and prejudice within the meaning of section 3 or 13 of the act, it must not only be shown that there is an unjustified disparity in rates from a transportation standpoint, but that there is subsantial competition between the complaining parties and those alleged to be preferred so that the rate disparity may be said to result in disadvantage to the former and corresponding advantage to the latter. Complainant must show that shipments have been or will be made or prevented or that complainant has been or will be otherwise injured because of the rate disparity." (255 I. C. C., at 203).

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no determination of their reasonableness or of the reasonableness of the increase ordered could have been made by the Commission. Appellees recognize this fact by their contention that no issue of the reasonableness vel non of the intrastate rates arises in this case. This contention ignores the requirement of a determination of the reasonableness of the existing or prescribed rates inherent in numerous decisions of this Court to the effect that the Commission is without authority to raise intrastate rates above a reasonable level. *Georgia Public Service Commission vs. United States, 283 U. S. 765, 75 L. Ed. 1397; Florida vs. United States, supra; United States vs. Louisiana, 290 U. S. 70, 78 L. Ed. 181.* The prohibition against the Commission raising intrastate rates above a reasonable level obviously cannot be enforced if the Commission is permitted to raise such rates on the basis of a record devoid of evidence from which such level can be determined.

Appellees' remaining contentions relate to the asserted sufficiency of the evidence upon which the Commission acted and must be examined in the light of the recognized restrictions imposed upon the Commission when it enters the field of intrastate rate regulation.

Reference has been made to decisions of this Court holding that intrastate rates may not be raised above a reasonable level, nor increased solely on the basis of a disparity. There are many other restrictions on the au-

thority of the Commission to raise such rates relevant to a consideration of appellees' motion./[7]

It may not regulate such rates for the purpose of protecting interstate commerce from potential competition. *Florida vs. United States, supra.*

The justification for the exercise of the federal power within what would otherwise be the domain of state power must clearly appear. *City of Yonkers vs. United States, 320 U. S. 685, 88 L. Ed. 400.*

Its power over purely intrastate rates begins at the point where the action of the state would bring about the prejudice or discrimination prohibited by *Section 13(4) of the Interstate Commerce Act.* Up to this point the state's power is exclusive. *North Carolina vs. United States, supra.*

Intrastate transportation being primarily the concern of the state the Commission's power is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. For this reason its orders increasing intrastate rates must meet "a high standard of certainty," must rest upon "clear findings, supported by evidence, of each element essential to the exercise of" the federal power and "justification for the exercise of the

7/ Appellees incorporate in their motion that portion of the Commission's report (see Footnote 6, this brief) holding that the Oklahoma and Arkansas complaining points were under the obligation of showing that the intrastate rates complained of had or would result in shipments being made or prevented, or that the complaining points had been or would be otherwise injured because of the rate disparity.

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federal power must clearly appear." *North Carolina vs. United States, supra,* and *cases cited therein.*

Appellees contend that justification for the Commission's action/[8] is found in a record said to demonstrate that the Arkansas and Oklahoma manufacturers are victims of a substantial competitive disadvantage which operates to their detriment and to the benefit of intervenors-appellants, their Texas and Louisiana rivals. The evidence cited as supporting this contention falls far short of the minimum requirement for federal regulation of intrastate rates.

Appellants concede that soda ash is an indispensable and substantial ingredient in the manufacture of glass products but point out that this fact does not alter the requirement that justification for the exercise of the federal power wihin the field of intrastate rate regulation must clearly appear.

Appellees' motion states that:

> "A witness from one of the complainants located at Fort Smith testified that his company is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1% of its inbound materials in weight and about 50% in cost (excluding

8/ The Commission concluded that the Texas and Louisiana intrastate freight rates violated **49 U. S. C., Sections 1, 3 and 13 (4),** in that they gave an undue or unreasonable advantage or preference to the intrastate commerce of intervenors-appellants, manufacturers of glass products with plants located in Texas and Louisiana and were prejudicial to the interstate commerce of manufacturers of similar products located in Oklahoma and Arkansas and ordered these rates increased by four cents per one hundred pounds for shipments in carload lots.

cullet or scrap glass), as contrasted with silica sand which constiuttes 38.5% in both weight and cost. (Tr. 34-35)."

The statement that the Fort Smith company is severely handicapped by its rate on soda ash is nothing more than a conclusion. The cost of an ingredient constituting 10.1% of the weight of all ingredients used in the finished product is irrelevant in a consideration of the cost of the transportation of such ingredient, and the difference of a mere 8 *cents* per *ton* on *finished* window glass between the existing and the prescribed rate on soda ash conclusively demonstrates both the lack of a substantial competitive disadvantage operating to the detriment of the Fort Smith company as a result of the rate disparity and the futility of the Commission's attempt to equalize the competitive position of Fort Smith and Shreveport by the order under consideration./[9]

Although this is not the brief of Texas and the intervening glass manufacturers located therein, we point

9/ The Fort Smith, Arkansas, manufacturer mentioned, the Harding Glass Company, is the only complainant before the Commission competing with intervenor-appellant Libbey-Owens-Ford Glass Company located at Shreveport, Louisiana, and the latter is the only glass plant in Louisiana. Both of these companies manufacture window glass. **(268 I. C. C. 199).** The statement in the Commission's report that complaining manufacturers in competition with the Shreveport intervenor are also located at Henryetta and Okmulgee, Oklahoma, is misleading as neither of these manufacturers intervened, gave any evidence or otherwise participated in the proceeding. (Tr. 121). According to the testimony cited in appellees' motion 10.1% of each ton of window glass, or 202 pounds, represents soda ash incorporated in the finished product. The prescribed increase of 4 cents per hundred pounds in freight rate applicable to this product, therefore, represents an increase of only 8 cents per ton on the finished product, which conclusively shows that the rate on soda ash is not responsible for any handicap under which the Fort Smith manufacturer operates.

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out that the reasoning of the preceding paragraph is also applicable to the statement in appellees' motion that:

> "The testimony of another witness, Vice-President of the Kerr Glass Manufacturing Corporation at Sand Springs, Oklahoma, shows that soda ash amounts to 25% in weight of the raw materials used by that company, and amounts to 50 to 60% of the cost of raw materials used (Tr. 15-16)."

The difference between the existing and prescribed rate as applied to a ton of finished product here would be only 20 cents and could not contribute to any competitive disadvantage suffered by the Sand Springs manufacturer.

In support of the contention that Oklahoma and Arkansas manufacturers compete with intervenors-appellants and are adversely affected by the rate disparity the motion of appelles states:

> "That the glass manufacturers who are the victims, and those who are the beneficiaries, of the rate disparity are in active competition, selling their products in the same market, is likewise established beyond dispute by the evidence of record.
>
> The witness John Bernier, an officer of the company at Sand Springs, testified that his company serves the territory west of the Mississippi River and east of the Rocky Mountains in competition with products from Palestine and Waco (Tr.

16)./[10] In this witness' judgment, the higher rate on so important a raw material 'puts us at a very great disadvantage.' (Tr. 16).

A witness from Fort Smith testified that his company sells flat window glass in competition with Shreveport. His competitors there have a lower rate, and this disparity places his company under 'an enormous handicap' (Tr. 34-35).

10/ This company does not experience competition from Shreveport as its product is not manufactured there (Tr. 32)."

Appellees have, of course, referred to the strongest and most definite evidence which can be cited in support of the Commission's action. We submit that appellees' motion itself demonstrates that the dissenting Judge was eminently correct in concluding:

"The evidence upon which the Commission's findings are based, in my judgment, is incompetent, consisting of conclusions, and does not approach that 'high standard of certainty,' prescribed by the Supreme Court in North Carolina, et al., vs. United States, et al., 325 U. S. 507; Houston & Texas Railway Company vs. United States, 234 U. S. 342; Florida, et al., vs. United States, et al., 282 U. S. 194." (Appendix "D" to appellants' jurisdictional statement).

Obviously, there are many factors other than the freight rate on a single ingredient which determine the success or failure of a manufacturer in selling his product

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in a competitive market. Among these factors are his geographical location, the inbound rates on all ingredients used, the outbound rates on the finished product, the efficiency of his manufacturing process and of his advertising and sales organizations, the quality of his product, and the number, location and efficiency of his rivals. For all this record shows any or all of these factors are responsible for the competitive disadvantage, if any, of the Oklahoma/[10] and Arkansas manufacturers. We categorically state that the record contains no evidence that the rate disparity adversely affects the complaining manufacturers except unsupported expressions of opinion. Argument seems unnecessary to demonstrate that this evidence falls far short of the "high standard of certainty" prescribed by *North Carolina vs. United States, supra.*

The motion of appellees further states:

> "The witness, D. C. Hamilton, of the Bartlett-Collins Company of Sapulpa, manufacturing a low-cost grade of tableware, anticipated potential competition from Waco and Palestine, because although the plants there were manufacturing other articles, it would be simple to change the moulds and go into production of glass tumblers in a few days (Tr. 114-115). The witness' company at the time of the hearing had a surplus of orders on hand (Tr. 121). He testified regarding the lower rates enjoyed by Eastern competition in so-called 'Official Territory' (Tr. 123-124)."/[11]

10/ Attention is directed to the fact that the single Louisiana glass manufacturer, Libbey-Owens-Ford, does not compete with the complaining manufacturers located in Oklahoma.

11/ Testimony relating to competition from "Official Territory" has no bearing on the issues of this case.

Appellees contend that the Commission would have been justified in ignoring existing conditions and prescribing intrastate rates on the basis of potential future competition. This argument is irrelevant in view of the Commission's assertion that such evidence was not considered and is unsound in view of the decision of this Court in *Florida vs. United States, supra.*

Appellees' contention that proof of loss of specific sales or shipments as a result of the rate disparity is unnecessary ignores, as did the Commission's report and order, the Commission's statement that such proof is an indispensable part of the case of the complaining manufacturers./[12] The argument that such proof is not required is based upon the statement in the Commission's report that:

> "In the nature of things the exact effect on the marketing of the finished product can not be shown."

The above statement is tantamount to an admis-

12/ See Footnote 6, this brief. It also ignores established principles long recognized by the Commission:

"Although complaintants' witnesses refer generally to competitors having lower rates, there is no evidence of shipments from the alleged preferred points or that complainant's movement has been retarded because of the lower rates therefrom. We find that the allegation of undue prejudice has not been sustained." **Knoxville Freight Bureau vs. Southern Railway Company, 156 I. C. C. 315.**

"While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made.

There may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference." **Barrett Company vs. AT&SF Railway Company, 172 I. C. C. 319.**

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sion that the complaining manufacturers were unable to meet the minimum evidential standard of this type of case. It is significant that the case cited in support of this contention, *Federal Trade Commission vs. Morton Salt Company, 334 U. S. 37, 92 L. Ed. 1196*, does not involve the Interstate Commerce Act.

It is unnecessary for appellants to contend, as appellees assert they may, that the Commission should have related the interstate rate to the intrastate rate, in view of the above-mentioned violations by the Commission of the restrictions affecting its actions in the field of intrastate rate regulation.

The assertion that the intrastate rates were unduly low because of the producers' competition with Official Territory, or possibly because of inadvertent classification, is meaningless in view of the absence of any showing whatever of the reasonableness of these rates. Further, the existing intrastate rates were fixed as a result of the applications of the carriers transporting the soda ash (Tr. 124), and it is safe to assume that these carriers would neither apply for, nor acquiesce in the continued enforcement of, rates that were unduly low.

The complete disregard by the Commission of the restrictions surrounding its exercise of authority in the field of intrastate rate regulation is demonstrated by a summary of the Louisiana situation. As pointed out in Footnote 9 intervenor-appellant Libbey-Owens-Ford Glass Company operates at Shreveport, the only glass plant in

Louisiana. This plant obtains its soda ash from Lake Charles and North Baton Rouge, in the same State. The only complainant before the Commission who competes with Libbey-Owens-Ford Glass Company, at Shreveport, is Harding Glass Company located at Fort Smith, Arkansas. The Fort Smith manufacturer obtains no soda ash from North Baton Rouge and none from Lake Charles except in an emergency (Tr. 152). There is no evidence as to the volume of soda ash obtained in such emergencies. For all the record shows only one carload a year moves from Lake Charles to Fort Smith. It was upon this evidence, and upon a record subject to the numerous infirmities pointed out above, that the Commission found that the state-prescribed rate on soda ash from North Baton Rouge and Lake Charles to Shreveport, in Louisiana, was unduly and unreasonably advantageous and preferential to the intrastate commerce of Libbey-Owens-Ford Glass Company and prejudicial to the interstate commerce of Harding Glass Company, at Fort Smith, Arkansas, and ordered an increase of 4 cents per hundred pounds in the Louisiana intrastate rate. The arbitrary and unreasonable nature of the Commission's action is further illustrated by the fact that the intrastate rate established between Lake Charles and Shreveport, in Louisiana, is 68% of the interstate rate established between Lake Charles and Fort Smith, Arkansas, although the distance between Lake

Charles and Shreveport is only 40% as great as that between Lake Charles and Fort Smith./[13]

It is apparent that as to both states the Commission acted without sufficient evidence to justify an order under *Section 13(4) of the Interstate Commerce Act.* The majority decision below stands for the proposition that the Commission, when acting under the authority of that section, may declare an intrastate rate undue or unreasonable in relation to an interstate rate without inquiring into the reasonableness of either, that it may order an intrastate rate increased on the basis of disparity alone, that it may set aside an intrastate rate as prejudicial to the interstate commerce of a complaining shipper without evidence that a single shipment has been or will be made or prevented, or any business lost, as a result of the rate complained of and that it may base its orders on evidence consisting exclusively of opinions, conclusions and conjecture.

13/ The Commission's order establishes an intrastate rate on soda ash between Lake Charles and Shreveport of 21 cents per hundred pounds and an interstate rate of 31 cents on the same commodity between Lake Charles and Fort Smith. The distance between Lake Charles and Shreveport is 175 miles, that between Lake Charles and Fort Smith 437 miles.

THE CONTENTION THAT APPELLANTS DID NOT EXHAUST THEIR ADMINISTRATIVE RECOURSE AS REQUIRED BY 49 U. S. C., 17(9)

This contention was rejected by the Court below.

Appellees contend that under *Section 17(9) of the Interstate Commerce Act*, it is necessary that a reconsideration, rehearing or reargument be disposed of by the Commission as a whole, or an appellate division thereof, before resort may be had to the courts. The argument seems to be predicated upon a very narrow and, we submit, incorrect, construction of the pleadings in this case, as well as all proceedings taken before the Interstate Commerce Commission.

It is true that Paragraph 1 of the complaint states that this suit is for the purpose of enjoining the order of the Interstate Commerce Commission of May 25, 1948, entered by Division 3. It is equally true, however, that the complaint alleges in Paragraph 13, that on March 3, 1947, Division 3 of the Interstate Commerce Commission entered an order upon the subject and such order was attached as Exhibit "D"./[14] It is also true that in Paragraph 14 of the complaint, it is alleged that motions for reopening and reconsideration were filed in due time, and that these were overruled on September 4, 1947, by the Commission as a whole. The order of the Commission denying the rehearing is attached to the complaint as Exhibit "E"./[15]

14/ Appendix "A" to appellants' jurisdictional statement.
15/ Appendix "B" to appellants' jurisdictional statement.

It is further alleged in Paragraph 18 of the complaint that Division 3 of the Commission, on May 25, 1948, entered the final order complained of, and a copy is attached to the complaint as Exhibit "F"./[16]

The prayer of the complaint is as follows:

"3) That a permanent injunction be granted restraining the enforcement, operation, and execution of said ORDERS of the Interstate Commerce Commission, and that the same be annulled and set aside;

4) That Petitioners be granted such other and further relief as may be proper and just in the premises."

An examination of Exhibit "F" (order of date May 25, 1948) will disclose that that order did nothing except to put into effect the order which had been previously entered (Exhibit "D") by Division 3 of the Commission, and which order had been reviewed and reconsidered by the entire Commission on September 4, 1947. (Exhibit "E").

The wording of the last mentioned order (Exhibit "E") shows clearly that the point had been reconsidered by the entire Commission, and the order entered by it reads, in part, as follows:

"Upon further consideration of defendants' petition for reconsideration; petition of Knox Glass Bottle Company of Mississippi and Owens-Illinois Glass Company, intervenors, for re-argument and recon-

16/ Appendix "C" to appellants' jurisdictional statement.

sideration; petition of Libbey-Owens-Ford Glass Company, intervenor, for rehearing; petition of the Railroad Commission of Texas for reconsideration and petition of Louisiana Public Service Commission for rescission, annullment and cancellation of the order * * *."

It was ordered by the entire Commission that these petitions for reconsideration be denied.

As pointed out, the order entered on May 25, 1948, was merely an order to put into effect the decision which had already been reached and which had been reconsidered by the entire Commission.

The rules adopted by the Interstate Commerce Commission specifically provide that successive petitions for rehearing on the same ground will not be heard. This is covered by *Paragraph (f) of Rule 101 of the Interstate Commerce Commission*, which is as follows:

"SUCCESSIVE PETITIONS ON THE SAME GROUNDS, NOT ENTERTAINED—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

Appellees contend that since no petition for rehearing was filed specifically to the order of May 25, 1948, the complainants here did not exhaust their recourse before the Commission. The order of May 25, 1948, was

entered without a hearing. The matters embodied therein had already been heard by Division 3 of the Commission, and this Division had been upheld by the entire Commission. The very fact that the Commission thought that it was justified in entering such an order as that of May 25, 1948, without a hearing, indicates clearly that it considered that all matters involved in the order had been previously heard and determined by it.

None of the cases cited in appellees' motion are in point. It does not appear that any application for a reconsideration was made to the Commission in the District Court case cited in Footnote 16. *Industrial Addition Association vs. Commissioner, 323 U. S. 310, 89 L. Ed. 260,* involved a review by a Court of Appeals of a determination by the Tax Court. *Freeman vs. Bee Machine Company, Inc., 319 U. S. 488, 87 L. Ed. 1509,* dealt with the removel of a case from the state to the Federal Court. *United States vs. Griffin, 303 U. S. 226, 82 L. Ed. 764,* hold that the Urgent Deficiencies Act of October 22, 1913, does not confer upon a Federal District Court jurisdiction to review an order of the Interstate Commerce Commission made under the *Railway Mail Pay Act of July 28, 1916.*

As pointed out the complaint sets out the procedure by which the Commission arrived at its decision and upon which is based its order of May 25, 1948. Copies of the several orders which form the basis for the order of May 25, 1948, are a part of the complaint. The prayer of the

complaint, it will be observed, asks that the "ORDERS" be annulled—the word is in the plural deliberately and purposely, and asks that all orders constituting the foundation of the order of May 25, 1948, be annulled. It is submitted that it would be a very narrow construction of the complaint—in fact, it would de the complaint violence to construe it to mean that it has reference solely and exclusive to the order of May 25, 1948, standing alone.

Further, we point out that the complaint asks for general relief upon the facts alleged. If its previous consideration of the question by the Interstate Commerce Commission is not to be considered in the decision of this point, then it seems but logical to say that the Interstate Commerce Commission has entered an order, nullifying intrastate rates fixed by the proper authorities of the States of Louisiana and Texas, without an investigation and "the full hearing" required by *Paragraph 4 of Section 13 of the Interstate Commerce Act.* To put it another way—appellees cannot argue that the hearings previously held complied with *Paragraph 4 of Section 13*, but that the decisions previously made by the Commission on the subject and as a result of these hearings are not to be considered in the determination of whether or not a rehearing has been denied by the Commission.

It is submitted that appellants did exhaust their administrative recourse and that, under the express rules adopted by the Interstate Commerce Commission, they were barred from a second petition to the Commission for a reconsideration of the issues involved.

CONCLUSION

The motion to affirm should be overruled.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General of Louisiana,
Baton Rouge, Louisiana,

CARROLL BUCK,
First Assistant Attorney General of Louisiana, Baton Rouge, Louisiana,

SIDNEY M. COOK,
Special Assistant to the Attorney General of Louisiana,
Shreveport, Louisiana,
ATTORNEYS FOR APPELLANTS, STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION.

A. W. GILLILAND,
Oklahoma City, Oklahoma,

SIDNEY M. COOK
Shreveport, Louisiana,

CHARLES D. EGAN,
Shreveport, Louisiana,
ATTORNEYS FOR APPELLANT, LIBBEY-OWENS-FORD GLASS COMPANY.

APPENDIX "A"

28 U. S. C. 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

APPENDIX "B"

28 U. S. C. 2101:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court./*

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

*/ Subdivision (a) is quoted because of the relation of Subdivision (b) thereto.

APPENDIX "C"

49 U. S. C., 13(4):

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minumum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classification, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

APPENDIX "D"

49 U. S. C., 17(9):

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

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No. 754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

THE STATE OF TEXAS, ET AL.,
Appellants

versus

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal From the District Court of the United States for the Western District of Oklahoma

BRIEF OF STATE OF TEXAS, RAILROAD COMMISSION OF TEXAS, KNOX GLASS BOTTLE COMPANY OF MISSISSIPPI, AND OWENS-ILLINOIS GLASS COMPANY, APPELLANTS, IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

PRICE DANIEL
Attorney General of Texas
CHARLES E. CRENSHAW
Assistant Attorney General of Texas
Attorneys for Appellants,
State of Texas and Railroad
Commission of Texas

FRED FULLER
JOHN L. GUSHMAN
Toledo, Ohio
Attorneys for Owens-Illinois
Glass Company

ARNOLD BOYD
New York, New York
Attorney for Knox Glass
Bottle Company of Mississippi

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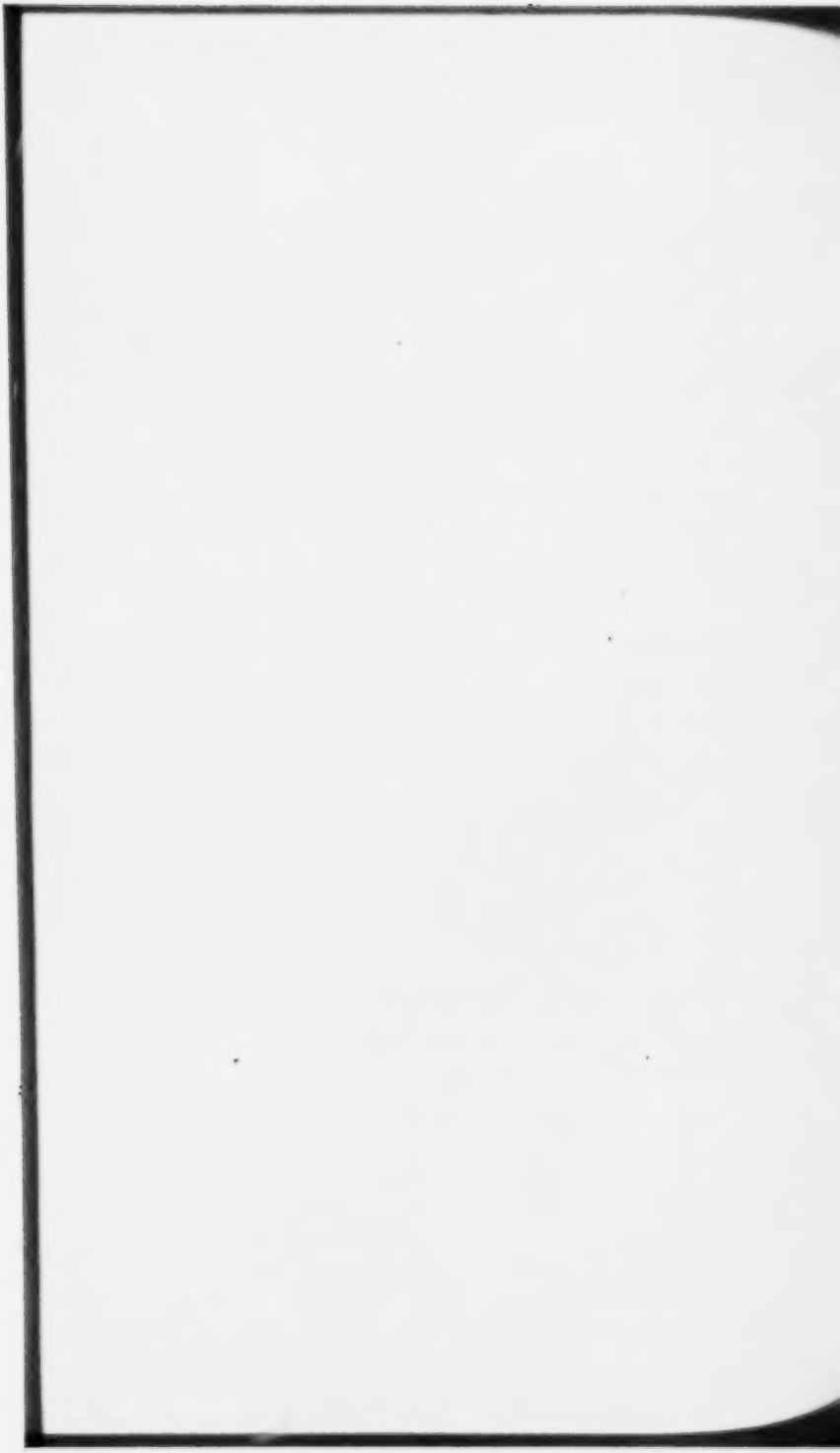

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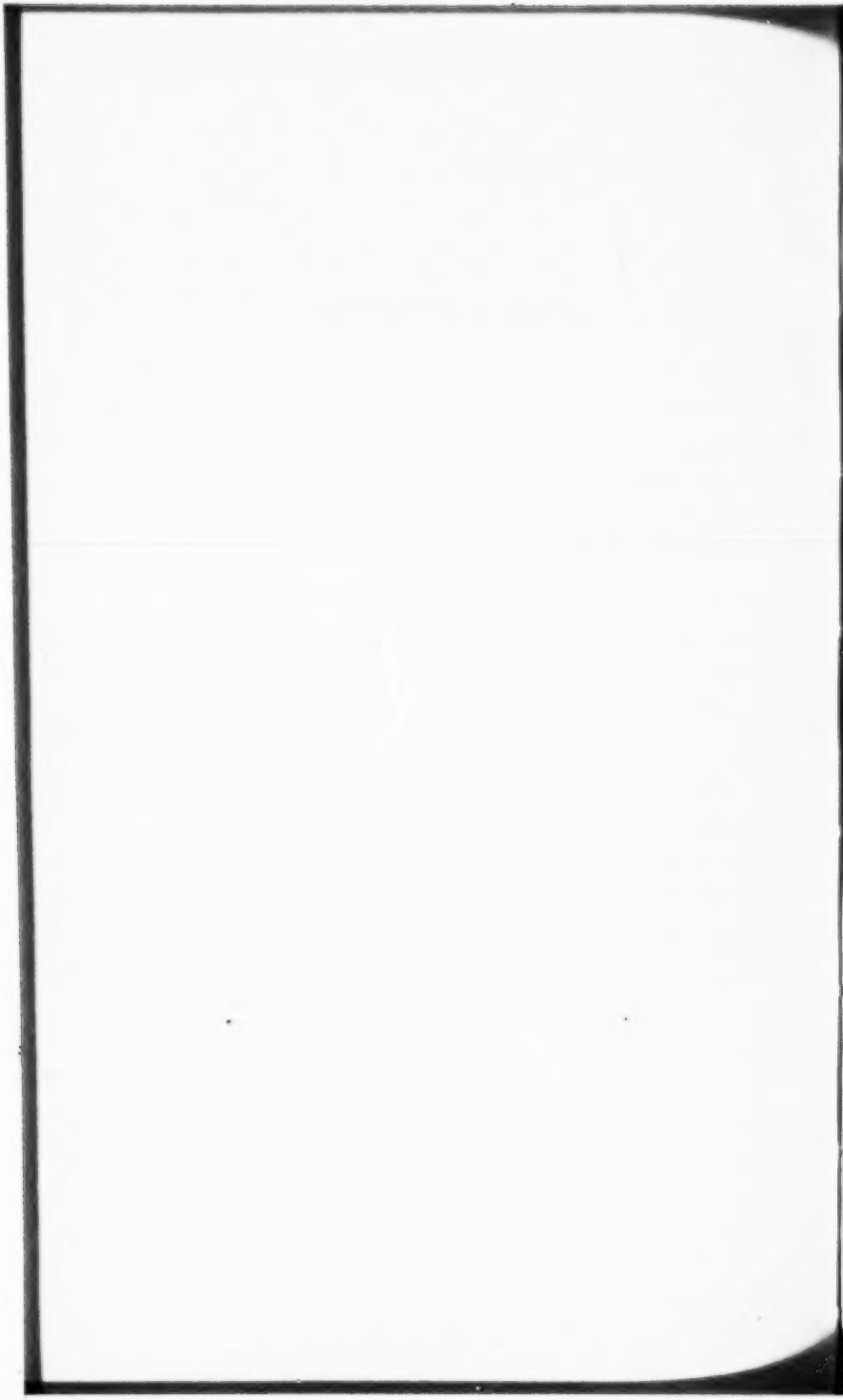

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INTRODUCTION

Pursuant to Rule 7, Paragraph 3 of the Revised Rules of this Court, Appellants, State of Texas, Railroad Commission of Texas, Knox Glass Bottle Company of Mississippi, and Owens-Illinois Glass Com-

pany[1] file this their brief in opposition to Appellees' Motion to Affirm.

The position of these Appellants, with the exception of certain evidentiary particulars, is identical with that of Appellants, State of Louisiana, Louisiana Public Service Company and Libbey-Owens-Ford Glass Company. For that reason, we adopt their brief heretofore filed herein. However, insofar as the evidence relates particularly to these Appellants, we desire to submit additional argument.

SUMMARY OF ARGUMENT

The findings by the Interstate Commerce Commission[2] and the District Court that the Texas intrastate soda ash rate to Palestine and Waco results in undue preference and prejudice are not supported by substantial, sufficient, or competent evidence as prescribed by this Court. *North Carolina v. United States,* 325 U.S. 507, 89 L. Ed. 1760, and cases therein cited.

Argument and Authorities

This Court in *North Carolina v. United States,* supra, clearly stated that before the Interstate Commerce Commission can "nullify", "supplant" or give "precedence to federal rates", "a high standard of certainty" must be met; "justification . . . must clearly appear"; and "clear findings, supported by evidence of each element essential to the exercise of that power" appear. In this case the Commission has admittedly

[1]Owens-Illinois Glass Company operates a plant at Waco, Texas; Knox Glass Bottle Company of Mississippi has a plant located at Palestine, Texas.

[2]Exhibit "D" to complaint.

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made "clear findings", but the evidence does not meet or even approach the "high standard of certainty" required. Rather, the evidence here does not support the findings, and neither does it afford a clear justification for the Commission's order overturning the Texas intrastate rate on soda ash to Palestine and Waco. The questions relating thereto are so serious and substantial that a dissent to the majority opinion below was made by Judge Vaught, who wrote:

> "The evidence upon which the Commission's findings are based, in my judgment, is incompetent, consisting of conclusions, and does not approach that 'high standard of certainty' prescribed by the Supreme Court. . . ."

The decision to be made in this case, therefore, is: Was the Commission's order overturning the Texas intrastate soda ash rate to Palestine and Waco clearly justified on the basis of the evidence presented?

That the question is substantial is at once apparent. It is as was said in *Houston and Texas Ry. v. United States,* 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833:

> "We are not unmindful of the gravity of the question that is presented when State and Federal views conflict."

It becomes necessary, then, to give serious consideration to the evidence bearing upon the Texas soda ash rate, which has been condemned by the Commission.

Competition

The only testimony in the record which could even remotely establish competition between any of the complaining glass companies and the Texas glass manu-

facturers at Waco and Palestine is found in that of Mr. John Bernier, Vice-President of Kerr Glass Manufacturing Corporation, located at Sand Springs, Oklahoma. He stated "we manufacture glass jars and jelly glasses" (Tr. 15); "Our Sand Springs factory serves generally the territory west of the Mississippi River and east of the Rocky Mountains from Canada to the Gulf. In serving this territory we meet competition from manufacturers not only located in Oklahoma but those located at such points as Palestine, Waco and Wichita Falls, Texas" (Tr. 16); and, "Competition in the glass container industry is keen. . . ." (Tr. 18).

These statements are mere conclusions unsupported by any evidentiary fact. They are nothing more than general declarations. The Commission itself has many times refused to permit such testimony to establish competition. In *Barrett v. A.T. and S.F. Railway Co.*, 172 I.C.C. 319, it was said:

> "General declarations as to competition or injury unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue preference and prejudice.'"[3]

Another Oklahoma citizen, Mr. D. C. Hamilton, Vice-President and General Manager of Bartlett-Collins Company at Sapulpa, Oklahoma, manufacturers

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[3]In support of this principle the Commission cited Florida v. United States, 282 U.S. 194; Kirby-Bonner Lumber Co. v. Director General, 78 I.C.C. 333, 335; Mutual Creamery Co. v. American Railway Express Co., 132 I.C.C. 207, 221; Aluminum Co. of America v. A.T. & S.F. Railway Co., 146 I.C.C. 363, 372; Intrastate Rates within Louisiana, 164 I.C.C. 600, 616; American Sugar Refining Co. v. C.B. & Q. Railroad Co., 169 I.C.C. 557, 568.

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of glass tableware, stated that there are no competitors in the Southwest with the products he manufactures (Tr. 124).

Mr. O. C. Hubbard, General Manager, Radiant Glass Company, Ft. Smith, Arkansas, stated his company makes water glasses, water bottles, glass bottles, water jars, lamp chimneys and light globes (Tr. 48). But he declared that his Texas competitor was at Brownwood (Tr. 49), and he did not compete with Palestine (Tr. 50).

Thus we see clearly that this evidence falls far short of meeting the requirements firmly established by the Commission prior to its finding here. This testimony is all the complaining companies offered as to competition. Measured by the standards required by this Court in *North Carolina v. United States,* supra, the finding regarding competition should fall.

Disadvantage

We have seen the weakness of the findings relating to the existence of competition. But as to disadvantage, harm or injury, vital to a valid finding of undue prejudice, the evidence is totally lacking. Again we refer to the testimony of Mr. Bernier, Mr. Hamilton and Mr. Hubbard for therein lies the only mention of prejudice.

Mr. Bernier said that "with a relatively higher rate on soda ash applying to our factory in Oklahoma as compared to the rates to the factories of our competitors, puts us at a very great disadvantage (Tr. 16). He further stated ". . . as is evidenced by the location of such factories as the ones at Palestine and Waco, Texas, it is evident that they are located where all

things, including rates on inbound materials, are most favorable, and unless the Oklahoma and Arkansas factories are accorded rates on the same relative basis as those of competitors they are going to continue to be seriously affected during the post-war period." (Tr. 18).

Here again is the same type of general declaration made concerning competition with Waco and Palestine. Here again is an opinion and conclusion, vague and uncertain because it finds no support in a single evidentiary fact showing in any degree whatever how or to what extent the difference in the inbound rate to Waco and Palestine, as contrasted with those to Oklahoma destinations, curtails, retards or prevents complainants' shipments on any commodity either inbound or outbound. This same type of evidence has repeatedly met with failure before the Commission. In *Bronstein v. B. & O. Railroad Co.*, 215 I.C.C. 136, this principle was clearly announced as follows:

> "In support of the allegation of undue prejudice, complainants state that because of the 56½c rate from the belt to New York, merchants at interior points such as Scranton and Wilkes-Barre, Pa., buy their grapes at New York instead of Philadelphia. There is no evidence (1) of any shipments from the belt to New York, (2) that complainants' competitors at New York obtained any advantage as a result of the rate situation, or (3) that complainants were at a disadvantage in, or prevented from, making shipments because of the alleged preferentially lower rate to New York. A disparity of rates does not necessarily result in undue prejudice. *It must also appear that shipments are made or prevented because of the rate relation. This record contains no such evidence. The principle is 'firmly established that undue prejudice and preference must be proven by clear*

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and unmistakable evidence. General declarations of the character herein presented as to competition or injury unsupported by evidentiary facts are not sufficient.'" (Italics ours)

Mr. Hubbard and Mr. Hamilton, both of whom refuted any existing competition with Waco or Palestine plants, did not make even a general statement of being at a disadvantage because of the difference in the rates.

So, at most, the evidence presents only an assumption of undue preference and prejudice.

But Appellees contend in their Motion to Affirm:

> "A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appellate review not called for in the interest of orderly and efficient administration of justice."

Perhaps a second judicial review may be "burdensome", but not in the sense presented by Appellees. It may be "burdensome" to reiterate again and again to the Commission that it must meet "a high standard of certainty" in cases of this nature before nullification of a State's intrastate rate can be sustained. In any event, the questions presented by the appeal from the judgment below are of such substantial nature as to warrant their determination and disposition by this Court.

'See also Kistler Leather Co. v. B&O Railroad Co., 171 I.C.C. 659; Barrett Co. v. AT&SF Railway Co., 172 I.C.C. 319; Rathkamp Bros. Co. v. N&W Railway Co., 179 I.C.C. 25; Abrasive Co. v. Erie Railroad Co., 183 I.C.C. 103; Farmers Distributing Co., Inc. v. AT&SF Railway Co., 214 I.C.C. 796; Indiana Gas and Chemical Corp. v. B&O Railroad Co., 222 I.C.C. 618.

CONCLUSION

The Appellees' Motion to Affirm should be overruled.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

CHARLES E. CRENSHAW
Assistant Attorney General of Texas
Attorneys for Appellants,
State of Texas and Railroad
Commission of Texas

FRED FULLER
JOHN L. GUSHMAN
Toledo, Ohio
Attorneys for Owens-Illinois
Glass Company

ARNOLD BOYD
New York, New York
Attorney for Knox Glass
Bottle Company of Mississippi

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 754

THE STATE OF TEXAS, THE STATE OF LOUISIANA, RAILROAD COMMISSION OF THE STATE OF TEXAS, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered on January 26, 1949, by a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 23, 1949, and appeal papers served on March 28, 1949.

The Commission's order, dated May 25, 1948,[1] prescribed certain rail rates on dense soda ash, a commodity used in the manufacture of glass. Soda ash produced at Corpus Christi, Texas, and at Lake Charles and North Baton Rouge, Louisiana, is used by glass manufacturers located at Palestine and Waco, Texas, and at Shreveport, Louisiana. The same commodity is also used by glass manufacturers in Oklahoma and Arkansas who compete with those in Texas and Louisiana. Complaint was made to the Interstate Commerce Commission by the Corporation Commission of the State of Oklahoma and the Arkansas Public Service Commission, on behalf of the glass manufacturers in those States, complaining that the rates on soda ash from the producing points in Texas and Louisiana to the points in Oklahoma and Arkansas where glass is manufactured were too high in comparison with the rates from the same producing points to the points in Texas and Louisiana where competing glass manufacturers are located. The Commission's order found violations of Sections 1, 3, and 13 of the Interstate Commerce Act, as amended,[2] and prescribed a reduction in the interstate rates to Oklahoma and Arkansas points,[3] as well as an increase in the rates to Texas

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[1] The Order of May 25, 1948 (Exhibit "F" to complaint), was made pursuant to, and put into effect conclusions reached in, the Commission's report and order of March 3, 1947 (Exhibit "D" to complaint, 268 I.C.C. 195). Petition for reconsideration of the latter order was denied on September 4, 1947 (Exhibit "E" to complaint). No petition for reconsideration of the Order of May 25, 1948, was ever filed with or passed upon by the Commission.

[2] 49 U.S.C. 1, 3, and 13.

[3] Appellants do not attack this reduction. An interstate basic rate of 31 cents (the rate to St. Louis) was prescribed to Fort Smith, Arkansas, and to Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs, and Sapulpa, Oklahoma, and

and Louisiana points from Texas and Louisiana shipping points.[4]

Appellants' suit attacked the Commission's order insofar as it required an increase in the intrastate rates.[5] The District Court, in an opinion by Circuit Court Judge Murrah, rendered on January 26, 1949, upheld the Commission's order.

Appellees submit that this appeal involves no substantial questions. The points set forth in appellants' Jurisdictional Statement, insofar as relevant,[6] raise no issue other than the sufficiency of the evidence in the record to support the Commission's order. A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appel-

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points grouped therewith. Basic rates 4 cents higher than the existing basic rates from the producing points to Palestine and Waco, Texas, and Shreveport, Louisiana, were prescribed.

[4] The rates to be increased, being those from Texas and Louisiana producing points to Texas and Louisiana glass manufacturing points, are intrastate or interstate, as the case may be, according to the respective origins and destinations concerned. For convenience, however, we shall refer to these as the "intrastate rates."

[5] Appellants disclaimed at the trial any attack on that part of the order requiring reduction in the interstate rates to Oklahoma and Arkansas. A suit to set aside a Commission order may attack the order "in whole or in part." 28 U.S.C. 41 (28).

[6] The first two points enumerated by appellants relate to the reasonableness of the rates. As the District Court stated, that issue does not arise in this case. Appellants' third point alleges that the Commission's decision rests solely upon disparity between the intrastate and interstate rates. But, as the District Court pointed out, "The Commission's order in this case explicitly recognizes that disparity alone between particular rates on intrastate and interstate traffic does not empower it to prescribe intrastate rates." Appellants' remaining points deal with the alleged insufficiency of the evidence before the Commission to prove substantial injury to persons or localities in interstate commerce.

late review not called for in the interest of orderly and efficient administration of justice.

The Commission's legal authority to make an order prescribing intrastate rates which will eliminate undue prejudice against Oklahoma and Arkansas glass manufacturers is clear, and the order is unquestionably valid if the Commission's finding of undue prejudice against such manufacturers is supported by substantial evidence.[7]

Intrastate rates are subject to federal regulation when necessary to prevent undue prejudice against persons or localities in interstate commerce. This has been settled law since the well known *Shreveport* case, *Houston East and West Texas Railway Company* v. *United States*, 234 U.S. 342. Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4),[8] under which the Commission acted in the case at bar, has been described as a codification of the rule in the *Shreveport* case. *North Carolina*

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[7] The requirement of "a high standard of certainty" and "clear findings, supported by evidence, of each element essential to the exercise of" the Commission's power (*North Carolina* v. *United States*, 325 U.S. 507, 511) is met in this case.

[8] That provision reads as follows:

> Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes [a] *any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand*, or [b] any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected

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v. *United States*, 325 U.S. 507, 513. It will be noted that Section 13(4) deals with two types of situations authorizing the Commission to regulate intrastate rates. The first is the case of undue preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. This is the type of situation involved here. The second is the case of undue discrimination against interstate or foreign commerce as such. The distinction between the two types of situation is made plain in the passages marked (1) and (2) in the majority opinion in *North Carolina* v. *United States*, 325 U.S. 507, 510. In the *North Carolina* case there was no evidence in the record of competitive disadvantage or injury to any particular persons or localities, other than such as might be inferred from the mere fact that the intrastate and interstate rates were not identical. The primary issue in that case, and the issue as to which the dissenting justices were in disagreement with the majority of the Court, was whether a discrimination against interstate commerce as such had been proved, by showing that intrastate traffic was not producing its fair proportionate share of the

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thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. [Italics and letters in brackets supplied.]

As shown by the divisions into [a] and [b] inserted in the above quotation, the statute recognizes two types of situations in which the Interstate Commerce Commission is empowered to prescribe intrastate rates. In the case at bar we are concerned only with situation [a], where there is an undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. We are not concerned with discrimination against interstate commerce as such, which is also declared unlawful by the above-quoted section in the language designated as [b].

cost of maintaining an adequate and efficient national railway system. See 325 U.S. at 514, *et seq.; Wisconsin Railroad Comm.* v. *C., B. & Q. Railroad Co.,* 257 U.S. 563, 586; *Florida* v. *United States,* 282 U.S. 194, 211.

But there is no problem involved in the case at bar with respect to the adequacy of railroad revenues, or the justification of a State-wide increase in intrastate rates in order to furnish a fair share of the necessary revenues in order to prevent a burden upon interstate commerce as such.

For this reason the orders made by the State commissions of Texas and Louisiana are beside the point. Their findings that the present intrastate rates are amply compensatory and contribute adequately to the carriers' revenue needs (and thus do not burden interstate commerce as such) are irrelevant considerations in this type of case. Nor was the Interstate Commerce Commission required to investigate and make findings as to these issues. It was sufficient that it considered the reasonableness of the intrastate rates "*in their relation* to the rates to complaining points in Arkansas and Oklahoma."[9] A rate within the zone of reasonableness may be unlawful if it results in undue prejudice. *New York* v. *United States,* 331 U. S. 284, 344; *Ayrshire Collieries Corp.* v. *United States,* 335 U. S. 573, 594.

We are dealing in the case at bar with a situation precisely like that in the *Shreveport* case, where direct injury to particular persons and localities in Oklahoma and Arkansas is shown to result from the competitive disadvantage to which they are subjected in the sale of their glass products in a

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[9] See Ex. G to complaint, p. 5. Italics supplied.

common market, as a result of the rate discrimination practiced against them and in favor of their Texas and Louisiana competitors in respect of the inbound freight rates on soda ash, an indispensable raw material for their industrial operations.

The Commission's findings, and the evidence of record, plainly show that the Oklahoma and Arkansas glass manufacturers are victims of a substantial competitive disadvantage which operates to their detriment and to the benefit of their Texas and Louisiana rivals. The substantial character of the disadvantage is shown by the clear testimony that soda ash is an indispensable and important raw material for the manufacture of glass (Tr. 102). The Commission in its very thorough and painstaking report included a table (268 I.C.C. at 199) showing the substantial tonnage of this material used by the complaining manufacturers.

A witness from one of the complainants located at Ft. Smith testified that his company is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1% of its inbound materials in weight and about 50% in cost (excluding cullet or scrap glass), as contrasted with silica sand which constitutes 38.5% in both weight and cost (Tr. 34-35).

The testimony of another witness, Vice-President of the Kerr Glass Manufacturing Corporation at Sand Springs, Oklahoma, shows that soda ash amounts to 25% in weight of the raw materials used by that company, and amounts to 50 to 60% of the cost of raw materials used (Tr. 15-16).

That the glass manufacturers who are the victims, and those who are the beneficiaries, of the rate disparity are in active competition, selling

their products in the same market, is likewise established beyond dispute by the evidence of record.

The witness John Bernior, an officer of the company at Sand Springs, testified that his company serves the territory west of the Mississippi River and east of the Rocky Mountains in competition with products from Palestine and Waco (Tr. 16).[10] In this witness' judgment, the higher rate on so important a raw material "puts us at a very great disadvantage" (Tr. 16).

A witness from Ft. Smith testified that his company sells flat window glass in competition with Shreveport. His competitors there have a lower rate, and this disparity places his company under "an enormous handicap" (Tr. 34-35).

The witness D. C. Hamilton, of the Bartlett-Collins Company of Sapulpa, manufacturing a low-cost grade of tableware, anticipated potential competition[11] from Waco and Palestine, because although the plants there were manufacturing other articles, it would be simple to change the moulds and go into production of glass tumblers in a few days (Tr. 114-115). The witness' company at the time of the hearing had a surplus of orders on hand (Tr. 121). He testified regarding the lower rates

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[10] This company does not experience competition from Shreveport, as its product is not manufactured there (Tr. 32).

[11] Under Section 3(1) of the Act, as amended in 1940, to extend the prohibition against discriminations by adding the words "region, district, territory" as subjects of protection against the unlawful practices of carriers (*New York* v. *United States*, 331 U.S. 284, 297-300), the Commission would doubtless have had power to eliminate discriminations detrimental to the potential industrial development of Oklahoma and Arkansas. See *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 431, 444, 450-451. But in fact the Commission (as shown by Note 4 in its report) excluded all such merely potential competition from the scope of its findings under Sections 3 and 13 of the Act.

enjoyed by eastern competition in so-called "Official Territory" (Tr. 123-124).

Appellants argue here, as they did before the Commission and the District Court, that a sufficient showing of injury has not been made in the absence of proof that specific sales or shipments have been lost by complainants as a result of the rate disparity. This contention obviously embodies too narrow a concept of "injury." When substantial competition between the victims and beneficiaries of the rate disparity is shown, as well as the substantial character of the disadvantage resulting from the rates with respect to an essential raw material amounting to approximately half the cost of ingredients used in manufacture, the necessary requirement of showing injury proximately caused by the rate discrepancy is satisfied. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37.

Even if it were a fact (which is not shown by the record) that due to wartime conditions all the complaining manufacturers were able to dispose profitably of their entire production of glass (as the witness Hamilton testified with respect to the Sapulpa manufacturer of tableware (Tr. 121, *supra*)), it would nevertheless remain true that the Oklahoma and Arkansas manufacturers were suffering a competitive injury resulting from the disadvantageous rate relationship.

The fact that such injury might be nullified or overcome by other factors arising from wartime demand would not justify continuance of the rate disparity producing the injury. The disadvantageous competitive relationship, injurious to complainants and preferential to their Texas and Louisiana competitors, would continue to produce its full effects. The fortuitous circumstance that such

effects might be neutralized to some extent by other extraneous conditions would not justify continued maintenance of the discriminatory rates. The fact that the injured parties merely received diminished profits instead of being forced out of business as a result of the prejudicial rates would be no justification for the continuance of such an unwarranted competitive handicap.

On this subject the Commission used the following language:

> As stated by the intervening manufacturers, in order to establish unlawful person-locality preference and prejudice within the meaning of section 3 or 13 of the act, it must not only be shown that there is an unjustified disparity in rates from a transportation standpoint, but that there is substantial competition between the complaining parties and those alleged to be preferred so that the rate disparity may be said to result in disadvantage to the former and corresponding advantage to the latter. Complainant must show that shipments have been or will be made or prevented or that complainant has been or will be otherwise injured because of the rate disparity. We are here dealing with rates on an inbound raw material. In the nature of things the exact effect on the marketing of the finished product can not be shown. The language of sections 3 and 13 is broad and contains sweeping prohibitions against every form of undue prejudice, preference, advantage, or disadvantage, or unjust discrimination, as between persons and localities. There is real, substantial, and unwarranted disparity in the inbound rates on soda ash, an important raw material in the manufacture of glass, and there is keen competition in the sale of the finished products between the complaining manufacturers who are subjected to the relatively high rates and those at Pales-

tine, Waco, and Shreveport who are accorded the relatively low rates. Such rate disparity results and will result pro tanto in depriving the complaining manufacturers of that fair opportunity to which the law entitles them. [268 I.C.C. at 203.]

With respect to the competitive situation, the Commission found as follows:

The following is a summary of the competitive situation as disclosed by the record, insofar as material to this proceeding. One of the complaining manufacturers at Fort Smith makes window glass and markets its product west of the Mississippi River and in portions of Tennessee, Mississippi, Alabama, Georgia, Florida, and Illinois in competition with the manufacturer at Shreveport. It obtains its soda ash from Lake Charles and Corpus Christi, and is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1 per cent of its inbound materials in weight and about 50 per cent in cost (excluding cullet), as contrasted with silica sand, which constitutes 38.5 per cent of its inbound materials in both weight and cost. Complaining manufacturers who produce and ship window glass, in competition with the Shreveport intervener, are located also at Henryetta and Okmulgee. The complaining manufacturer at Sand Springs makes glass jars and jelly glasses, markets its products west of the Mississippi River and east of the Rocky Mountains in competition with manufacturers at Palestine, Waco, Jackson, and Alton, and is severely handicapped by its relatively high rates on soda ash, which it obtains from North Baton Rouge and Corpus Christi and which constitutes about 25 per cent of its inbound raw material in weight and from 50 to 60 per cent in cost. Complaining manufacturers who

> produce and ship glass containers, in competition with the Palestine and Waco interveners, are located also at Ada, Blackwell, Okmulgee, Poteau, and Sapulpa. [268 I.C.C. at 199.]

Appellants may argue that the Commission should have reduced the interstate rates to the intrastate level in order to remove the disparity in relationship between them. To this it may be answered in the first place that, as held in the *Shreveport* case, the judgment as to what will constitute a reasonable level of interstate rates must be determined exclusively by the federal authority. When such a determination has been made, it is the intrastate rates which must be modified to bring about a non-discriminatory relationship. In the second place, the Commission was justified in giving appropriate weight to the contentions of the carriers that the intrastate rates on soda ash were unduly low, as a result of several factors. There was testimony that these rates were maintained at a low level because the producers wanted to compete with Official Territory (Tr. 262). There was also testimony indicating that the low rates on dense soda ash (the type used by glass manufacturers) were maintained because of inadvertent classification. Light soda ash, a commodity used by paper manufacturers, and not competitive with dense soda ash which is used for a different purpose, was given a low rate because it is used by a paper manufacturer at West Monroe, Louisiana, where water transportation is available. Because of a tariff rule requiring that the rate to intermediate points should be no higher than the rate to a more distant point, the West Monroe water-compelled rate on *light* soda ash was inadvertently made applicable to the intermediate points where *dense* soda ash

was consumed by glass manufacturers at Shreveport and Palestine (Tr. 365, 437).

In any event, appellants cannot prevail in the present action, for they have failed to comply with a statutory condition precedent to bringing suit. They have not exhausted their administrative recourse, as required by Section 17(9) of the Interstate Commerce Act (49 U.S.C. 17(9)).[12]

The order which this suit seeks to set aside was issued by Division 3 of the Interstate Commerce Commission on May 25, 1948. This order, supplementing a prior order of the Commission, was limited to certain intrastate rates on dense soda ash in Texas and Louisiana. It required the respondent railroads to cease and desist from practicing the unjust discrimination, undue prejudice and preference found to exist by the Division in its report of March 3, 1947, in the relation between these intrastate rates on dense soda ash and interstate rates on like traffic, and to establish the intrastate rates prescribed in its report of March 3, 1947.[13] From this order of May 25, 1948, no petition for rehearing, reargument, or reconsideration

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[12] It is there provided:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it *shall have been made and shall have been denied*, or after rehearing, reargument, or reconsideration otherwise disposed of, *by the Commission* or an appellate division, *a suit* to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, *may be brought in a court* of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*. (Italics supplied.)

[13] Appendix "F," pages V-VI, of the complaint.

was ever addressed to or passed upon by the entire Commission.[14]

The provisions of Section 17(9) are clear and unambiguous. They require as a condition precedent to the institution of a suit to set aside an order of the Commission the submission of the controversy to the entire Commission or an appellate division thereof [15] for final decision. This requirement is an integral part of the statutory scheme of procedure embodied in Section 17. There is here present a jurisdictional defect which cannot be waived. Compare *Industrial Addition Ass'n* v. *Commissioner,* 323 U. S. 310, 313; *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 453; *United States* v. *Griffin,* 303 U. S. 226, 229.[16]

Furthermore, this failure of plaintiffs to exhaust their administrative recourse cannot be classed as a mere "technical" defense. Following the action

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[14] Appellants make no allegation in their complaint that the order of May 25, 1948, was ever made the subject of petition to the entire Commission for rehearing, reargument, or reconsideration, or that such a petition was ever denied by it. This omission is not a mere defect in pleading, since no such petition in fact had been filed or denied by the Commission as a whole.

[15] No appellate division has been established; but the full Commission passes upon petitions for rehearing, reargument, or reconsideration.

[16] The District Court for the District of Utah, Central Division, in *Idaho* v. *United States,* Equity No. 439, dismissed for lack of jurisdiction a suit brought by the State of Idaho to annul and set aside an order of the Commission authorizing the abandonment of a branch line of railroad. In its Findings and Decree, April 17, 1943, not reported, the court held "That section 17(9) of the Interstate Commerce Act requires, as a condition precedent to the institution of a suit under the Urgent Deficiencies Act, a denial of a petition for rehearing, reargument, or reconsideration by the full Commission or an appellate division thereof, as provided in section 17(6) of said Act" and "that the filing of this suit was unauthorized and forbidden by law." Later a second suit was brought in the same court (Civ. No. 503) in which the Commission's order was upheld on August 9, 1943, 12 I.C.C.P.J. 916.

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of Division 3, of March 3, 1947, and its affirmance by the Commission's order of September 4, 1947 (Exhibit "E" of the complaint), both the Railroad Commission of Texas and the Louisiana Public Service Commission denied the participating rail carriers the right to put into effect the lower intrastate rates which the Commission had found would remove the prejudice against interstate traffic of the complaining manufacturers. A petition for reconsideration would have given the full Commission an opportunity to reexamine its order in the light of these pronouncements made by the State authorities. Resort to the procedure required by Section 17(9) would therefore have been more than a perfunctory step. It would not only have afforded the Commission opportunity to refute the position taken by the States of Louisiana and Texas, or to revise its own conclusions, as the case might be, but such action by the full Commission might also have facilitated the task of the reviewing courts by throwing additional light upon the questions at issue affecting the determination of the validity of the order involved.

It is submitted that the Commission's order in the case at bar is plainly sustained by clear findings and supported by evidence of each element essential to the exercise of the Commission's power over intrastate rates in order to prevent undue prejudice against persons or localities in interstate commerce, namely, the Oklahoma and Arkansas glass manufacturers who are injured by the prejudicial intrastate rates and placed at a substantial disadvantage in the marketing of their products in competition with Texas and Louisiana glass manufacturers who are beneficiaries of those rates. In any event, appellants cannot prevail in this

action since they did not comply with a statutory condition precedent to bringing suit.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General;
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APRIL 12, 1949.

Copies of this motion to affirm were mailed to counsel for appellants and counsel for all other parties, by the Attorney General's office, Washington, D. C.

ROBT. E. SHELTON.

Endorsed: Filed in District Court on April 12, 1949.

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MAY 31, 1949.

Per Curiam Decisions.

No. 754. TEXAS ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Price Daniel,* Attorney General, *Charles E. Crenshaw,* Assistant Attorney General, *Fred E. Fuller, John L. Gushman* and *Arnold Boyd* for the State of Texas et al.; and *Bolivar E. Kemp, Jr.,* Attorney General, *Carroll Buck,* First Assistant Attorney General, *A. W. Gilliland* and *Charles D. Egan* for the State of Louisiana et al., appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellees. Reported below: 84 F. Supp. 791.